TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 517

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

MRS. SALLIE C. WULF.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

FILED JANUARY 22, 1913.

(23,000)

(23,009)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 933.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MRS. SALLIE C. WULF.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1912.

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UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

Pleas and Proceedings had and done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, 1911, at Fort Worth, Texas, and on the third Monday in November, 1911, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable William I. Grubb, District Judge.

No. 2207.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

versus

SALLIE C. WULF, Defendant in Error.

Be it remembered, That, heretofore, to-wit: on the 24th day of April, 1911, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Eastern District of Texas was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figgures following, to-wit:

CAPTION.

BE IT REMEMBERED. That at a regular term of the Circuit Court of the United States for the Eastern District of Texas and in the Fifth Circuit, begun and held in the courtroom of said court in the City of Sherman, Texas, in said Circuit and District, on Monday, the Second day of January, A. D. 1911, it being the first Monday in said month, there were present, Honorable Gordon Russell, United States District Judge for the Eastern District of Texas; J. W. Ownby, Esq., United States District Attorney; J. B. Dailey, Esq., Assistant United States District Attorney; Dupont B. Lyon, Esq., United States Marshal, and C. C. Bumpas, Clerk, by J. R. Blades, Deputy. When the court being opened in due form by order of the judge the following proceedings were had, to-wit:

MRS. SALLIE C. WULF,

vs. C. L. No. 111.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

2 PLAINTIFF'S ORIGINAL PETITION.

The United States of America.

In the Circuit Court of the United States, for the Eastern District of Texas, at Sherman.

May Term, A. D. 1909.

To the Honorable Judge of Said Court:

Sallie C. Wulf, hereinafter styled plaintiff, complaining of the Missouri, Kansas & Texas Railway Company, hereinafter styled defendant, represents that plaintiff is a bona fide inhabitant, resident and citizen of Grayson County, Texas, and that defendant is a corporation, duly incorporated and organized under the laws of the State of Kansas; that defendant has various lines of railway within the State of Kansas and Texas, including the County of Labette in the State of Kansas and the County of Grayson in the State of Texas; that George Stoner is local agent of said defendant, representing it in Grayson County, Texas.

For cause of action, plaintiff represents that heretofore,

to-wit: On the 27th day of November, A. D. 1908, Fred S. Wulf was in the employment of the defendant, in the capacity of fireman on its locomotives. That on said date he was in the due performance of his duties as such fireman, on train No. 433, locomotive No. 488, bound from Parsons in the State of Kansas to Osage in the State of Oklahoma. That when said train had proceeded about four miles upon its route, and while it was in Labette County, Kansas, without fault or negligence upon the part of the said Fred S. Wulf, the locomotive drawing said train, upon which the said Fred S. Wulf was riding, suddenly exploded, blew up and gave way, thereby burning and scalding the said Fred S. Wulf, and throwing him with great force and violence from said locomotive a distance of about a hundred feet upon the ground and right-of-way there situate, so cruelly wounding, burning, bruising and mangling him as to cause his immediate death.

The defendant was then and there guilty of gross negligence and carelessness in this, to-wit: The locomotive then and there drawing said train, together with all the parts and parcels thereof, were old, worn, rusty, out of repair, improperly constructed and unfit for use.

3 The crown sheets, wagon top, valves, sides, ends and bottom, stay bolts, radial stays, and all the parts and parcels of the boiler of said locomotive were old, worn, rusty, corroded, crystalized, thin, improperly constructed, dangerous and unfit for use. That said stay bolts and radial stays were broken, old, worn, rusty, corroded, crystalized and the threads worn off and were improperly and insecurely fastened; that by reason of said defects, said locomotive boiler could not stand the pressure of the steam.

That the fire box constituting a part of said boiler was old, worn, burned, crystalized, rusty and thin, so that the same could not stand the steam pressure.

That the water gauge and steam gauge were old, worn, stopped up, broken and improperly constructed, so that they would not register correctly the amount of water and steam in said boiler.

That the defendant then and there refused to properly inspect said locomotive for the purpose of ascertaining its condition and keeping the same in repair.

That the defendant then and there failed and refused to make the necessary, customary and proper test of the strength of said locomotive boiler before turning the same out for use upon the road. That all of said defects were well known to defendant or could have been known by the use of ordinary care in time to have prevented the death of said Fred S. Wulf, but was unknown to decedent. That by reason of all said acts of negligence, jointly and severally, said locomotive was caused to blow up and explode as aforesaid, and cruelly killed the said Fred S. Wulf as aforesaid.

That at the time said Fred S. Wulf was killed, he was a young man, 22 years of age, strong, robust, healthy, energetic, and bid fair to live to an old age, to-wit: The age of 80 years, but for his untimely death as aforesaid.

That as heretofore set forth, he was a locomotive fireman with reasonable prospects for promotion to the position of locomotive engineer; that as such locomotive fireman he earned large sums of money, to-wit: The sum of one hundred and twenty-five ($125.00) dollars per month. That his time and services were reasonably worth said sum, and would have continued to have been worth said sum, and a larger sum, by reason of his promotion, except for his untimely death as aforesaid.

Plaintiff is the mother of the said Fred S. Wulf, and is a *feme sole:* and the said Fred S. Wulf was an unmarried man, leaving no wife or children surviving. That his father died prior to the time that he died, and plaintiff is the sole
4 heir, next of kin, and beneficiary of the estate of the said Fred S. Wulf, deceased. That there is no administration pending on the said estate of the said Fred S. Wulf, within this state or elsewhere, and that none is necessary. That said decedent was a resident citizen of the State of Texas when he was killed, but was temporarily working in Kansas.

That by virtue of the laws of the State of Kansas, where the said Fred S. Wulf was killed, a right of action is provided by statute, for injuries resulting in death. The said Fred S. Wulf contributed all of his earnings to the support of plaintiff at the time of his death, and would have continued to have contributed his said earnings to plaintiff's support during the remainder of his life and the life of plaintiff. That plaintiff has a reasonable prospect of living 40 years longer.

That by reason of the premises, plaintiff has been damaged in actual damages in the sum of forty thousand ($40,000.00) dollars.

Wherefore, plaintiff sues, and prays that defendant be cited to answer this petition, and upon final trial she have judgment for her damages and costs of suit.

J. H. WOOD,
J. P. HAVEN,
Attorneys for Plaintiff.

Filed Jan. 23, 1909.

C. C. BUMPAS,
By A. O. BRACKETT, Deputy.

5 ORIGINAL ANSWER.

In U. S. Circuit Court, Eastern District at Sherman, Texas.

Sallie C. Wulf,
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Co.

First. Defendant demurs generally to plaintiff's petition because the facts therein alleged show no cause of action.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Second. Defendant demurs specially to plaintiff's petition because: first, it is too general, vague and indefinite.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Third. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof thereof.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Fourth. Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by deceased's own negligence and want of ordinary care and by that of his fellow servants. That said injuries, if any were

received, resulted from one of the risks assumed by deceased. That of the said defects and causes which produced the injuries complained of, if any were produced, the deceased had full notice, or by the exercise of ordinary care on his part, would have had full notice in ample time to have avoided the same.

Wherefore defendant prays to be discharged with its costs.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Filed May 19th, 1909.

C. C. BUMPAS,
By A. O. BRACKETT, Deputy.

6 PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION.

In the Circuit Court of the United States, for the Eastern District of Texas.

Sallie C. Wulf,
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Company.

Now comes the plaintiff, Sallie C. Wulf, and after having obtained leave of the court, files this as her first amended original petition, amending her original petition filed herein January 23, 1909, and for such says:

That plaintiff is a *bona fide* inhabitant, resident and citizen of Grayson County, Texas, and was such at the time of the filing of this suit, and has so remained ever since. That defendant is a corporation duly incorporated and organized under the laws of the State of Kansas, and has various lines of railway within the States of Kansas, Oklahoma and Texas, including the County of Labette within the State of Kansas, and the County of Grayson within the State of Texas, and that the defendant has been duly served and filed its answer herein.

Plaintiff represents that she is the sole heir and next of kin of the hereinafter named Fred S. Wulf, deceased, and that at the time of the filing of the original petition herein there was no administration upon the estate of the said Fred

S. Wulf, deceased, and no necessity for any. That on the 4th day of January, A. D. 1911, she was duly appointed, temporary administratrix of the estate of the said Fred S. Wulf, deceased, by the County Court of Grayson County, Texas, a court of competent jurisdiction, and qualified as such and is now acting as such, with full power and authority to prosecute this suit as party plaintiff, and has made application to be appointed permanent administratrix at the ensuing term of said Probate Court for said purpose. That there now exists no necessity for an administration upon the estate of the said Fred S. Wulf, deceased, unless the same should be necessary for the sole purpose of prosecuting this suit as administratrix of said decedent for the benefit of herself as the surviving parent and next of kin of the said decedent; said plaintiff being the next of kin and sole beneficiary of whatever may be re-
7 covered in this suit. She therefore sues in her original capacity as such sole beneficiary and next of kin, but in the event it shall be determined that she is not entitled to recover in said capacity, then she asks that she be allowed to recover as administratrix for her benefit as aforesaid. Therefore, she sues both in her individual capacity and as administratrix as aforesaid.

For cause of action, plaintiff represents that heretofore to-wit, on the 27th day of November, A. D. 1908, Fred S. Wulf, was in the employment of the defendant, in the capacity of fireman on its locomotives. That on said date he was in the due performance of his duties as such fireman, on train No. 433, locomotive No. 488, bound from Parsons in the State of Kansas to Osage in the State of Oklahoma. That when said train had proceeded about four miles upon its route, and while it was in Labette County, Kansas, without fault or negligence upon the part of the said Fred S. Wulf, the locomotive drawing said train, upon which the said Fred S. Wulf was riding, suddenly exploded, blew up and gave way, thereby burning and scalding the said Fred S. Wulf, and throwing him with great force and violence from said locomotive a distance of about a hundred feet upon the ground and right of way there situate, so cruelly wounding, burning, bruising and mangling him as to cause his immediate death.

The defendant was then and there guilty of gross negligence and carelessness in this, to-wit: The locomotive then

and there drawing said train, together with all the parts and parcels thereof, were old, worn, rusty, out of repair, improperly constructed and unfit for use.

The crown sheets, wagon top, valves, sides, ends and bottom, stay bolts, radial stays, and all the parts and parcels of the boiler of said locomotive, were old, worn, rusty, crystalized, thin, improperly constructed, dangerous and unfit for use. That said stay bolts and radial stays were broken, old, worn, rusty, corroded, crystalized and the threads worn off and were improperly and insecurely fastened; that by reason of said defects, said locomotive boiler could not stand the pressure of the steam.

8 That the fire box constituting a part of said boiler was old, worn, burned, crystalized, rusty and thin, so that the same could not stand the steam pressure.

That the water gauge and steam gauge were old, worn, stopped up, broken and improperly constructed, so that they would not register correctly the amount of water and steam in said boiler.

That the defendant then and there refused to properly inspect said locomotive for the purpose of ascertaining its condition and keeping the same in repair.

That the defendant then and there failed and refused to make the necessary, customary and proper test of the strength of said locomotive boiler, before turning the same out for use upon the road. That all of said defects were well known to defendant, or could have been known by the use of ordinary care in time to have prevented the death of said Fred S. Wulf, but was unknown to decedent. That by reason of all said acts of negligence, jointly and severally, said locomotive was caused to blow up and explode as aforesaid, and cruelly killed the said Fred S. Wulf as aforesaid.

That at the time said Fred S. Wulf was killed, he was a young man, 22 years of age, strong, robust, healthy, energetic, and bid fair to live to an old age, to-wit, the age of 80 years, but for his untimely death as aforesaid.

That as heretofore set forth, he was a locomotive fireman with reasonable prospects for promotion to the position of locomotive engineer; that as such locomotive fireman he earned large sums of money, to-wit, the sum of one hundred and twenty five ($125.00) dollars per month. That his time and

services were reasonably worth said sum, and would have continued to have been worth said sum, and a larger sum, by reason of promotion, except for his untimely death as aforesaid.

That plaintiff is the mother of the said Fred S. Wulf, and is a feme sole, and that the said Fred S. Wulf was an unmarried man, leaving no wife or children surviving; that his father died prior to the time of his death, and that plaintiff is the sole surviving parent, heir, next of kin and beneficiary of his estate and of the amount recovered herein as hereinbe-
9 fore alleged.

That said decedent was a resident citizen of the State of Texas when he was killed, but was temporarily residing in the State of Kansas at the time that he met his death, which occurred in said State of Kansas as hereinbefore alleged.

That by virtue of both the laws of the State of Kansas, where the said Fred S. Wulf was killed, and the Acts of Congress of the United States of America, a right of action is provided for injuries resulting in death in the manner and form and in the occupation that deceased was engaged in at the time of his death.

That said decedent contributed all of his earnings to the support of plaintiff at the time of his death, and would have continued to have contributed his said earnings to plaintiff's support during the remainder of his life and the life of plaintiff. That plaintiff has a reasonable prospect of living 40 years longer. That whatever is recovered in this suit, whether individually or in a representative capacity, belongs, under the laws governing such matters, to plaintiff.

That by reason of the premises, plaintiff has been damaged in actual damages in the sum of forty thousand ($40,000.00) dollars.

Wherefore she sues, and defendant having duly answered herein, she prays that she recover her damages and costs of suit.

J. H. WOOD,
JAS. P. HAVEN,
Attorneys for Plaintiff.

Filed Jan. 6, 1911.

C. C. BUMPAS, Clerk.
By. J. R. BLADES, Deputy.

10 DEFENDANT'S FIRST AMENDED ~~PETITION~~ Answer.

In the Circuit Court of United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf,

vs. C. L. No. 111.

Missouri, Kansas & Texas Railway Company.

Now comes the defendant in the above cause, and by leave of the court first had and obtained, files this its first amended answer, and says:

I.

Defendant demurs generally to plaintiff's petition, because the facts therein alleged show no cause of action.

II.

Defendant demurs specially to plaintiff's petition, and says that said cause of action appears to be brought under the statutes of Kansas providing for a recovery of damages on account of injuries resulting in death and alleges her damages at the sum of $40,000.00, while plaintiff is not permitted, under the laws of Kansas, to recover in excess of $10,000.00 on such a cause of action.

III.

Defendant demurs to the following paragraph in plaintiff's petition specially, to-wit:

> "He (deceased) was a locomotive fireman with the reasonable prospects for promotion to the position of locomotive engineer."

Because the only materiality of such an allegation would be on the question of amount of recovery, and on that question the proposition of this promotion depended upon a great many contingencies, and was too speculative to be considered in arriving at the damages sustained by plaintiff.

IV.

It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf, that defendant was en-

gaged in Interstate Commerce between the States of Kansas
11 and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in Interstate Commerce between said states, and that said cause of action is not governed by the laws of Kansas.

V.

Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employers Liability Act, because at the time of the injury and death of F. S. Wulf, defendant was engaged in Interstate Commerce between the States of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such Interstate Commerce at the time of his injuries and death, and that such cause of action is governed by said Act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf and not to the plaintiff in this case.

VI.

Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof. Except that at the time the said deceased was killed he was engaged in Interstate Commerce.

VII.

Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by deceased's own negligence and want of ordinary care, and of that of his fellow servants; that said injuries, if any were received, resulted from one of the risks assumed by deceased; that of the said defects and causes, which produced the injuries complained of, if any were produced, the deceased had full notice, and by the exercise of ordinary care on his part would have had full notice in ample time to have avoided the
12 same. That at the time plaintiff was injured he was engaged in Interstate Traffic.

Wherefore, defendant prays to be discharged with its costs.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant.

Filed Jan. 6, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

13 SECOND AMENDED ANSWER.

In Circuit Court United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf,
vs. No. 111.
Missouri, Kansas & Texas Railway Company.

Now comes the defendant in the above cause, and by leave of the court first had and obtained, files this its second amended answer, and says:

I.

Defendant demurs generally to plaintiff's first amended original petition, because the facts therein alleged show no cause of action.

II.

Defendant demurs specially to plaintiff's petition and says that said cause of action appears to be brought under the statutes of Kansas provided for the recovery of damages on account of injuries resulting in death, and alleges here damages at the sum of $40,000.00 while plaintiff is not permitted under the laws of Kansas to recover in excess of $10,000.00 on such cause of action.

III.

Defendant demurs to the following paragraph in plaintiff's petition specially, to-wit:

> "He (deceased) was a locomotive fireman with the reasonable prospects for promotion to the position of locomotive engineer."

Because the only materiality of such an allegation would

be on the question of amount of recovery, and on that question the proposition of promotion depended upon a great many contingencies and was too speculative to be considered in arriving at the damages sustained by plaintiff.

IV.

It appears from plaintiff's petition that at the time of the
14 injury and death of F. S. Wulf, that defendant was engaged in Interstate Commerce between the States of Kansas and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in Interstate Commerce between the said states and that said cause of action is not governed by the laws of Kansas.

V.

Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employers Liability Act, because at the time of the injury and death of F. S. Wulf, defendant was engaged in Interstate Commerce between the States of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such Interstate Commerce at the time of his injury and death, and that such cause of action is governed by said Act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf, and not to the plaintiff in this cause.

VI.

Defendant specially excepts to that portion of said amended petition making the said Sally C. Wulf a party plaintiff in this cause, and shows that under the Act of Congress, known as the Employer's Liability Act, she is not a proper party to said suit.

VII.

Defendant specially excepts to that portion of plaintiff's amended petition making Sally C. Wulf temporary administratrix of the estate of said Fred S. Wulf, deceased, in this cause of action, because she was not made a party thereto as

such administratrix at the time of the filing of the original petition in this cause.

15 VIII.

Defendant specially excepts to that portion of plaintiff's petition wherein it seeks to make the said Sally C. Wulf administratrix of the estate of said Fred S. Wulf, deceased, a party plaintiff in this cause for it appears that said deceased, Fred S. Wulf, was killed on the 27th day of November, 1908, and the amendment making the said Sally C. Wulf administratrix, as aforesaid, party plaintiff herein, as appears in plaintiff's amended original petition filed in this cause January 6, 1911, the same being more than two years from the time the cause of action accrued in this case and the cause of action, if any the said Sally C. Wulf had on account of the death of the said Fred S. Wulf is barred by the limitation of two years.

16 IX.

Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof, except that this defendant says that at the time the said deceased was killed he was engaged in Interstate Commerce.

X.

Defendant for special answer to plaintiff's petition says that injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by deceased's own negligence and want of ordinary care, in that the train upon which deceased was firing was a long heavy train going up grade and if deceased had exercised ordinary care for his own safety he could and would have discovered there was something wrong on account of the excessive escape of steam and could have left said engine in time to have escaped injury; that of the said defects and causes, which produced the injuries complained of, if any were produced, the deceased had full notice, and by the exercise of ordinary care on his part would have had full notice in ample time to have avoided the same; that at the time plaintiff was injured he was engaged in Interstate Traffic.

XI.

Further specially answering herein this defendant says that the cause of action, if any there was, in the said Sally C. Wulf, administratrix of the estate of Fred S. Wulf, deceased, is barred by the two years' statute of limitation, and defendant here specially pleads said statute in bar of plaintiff's recovery.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant.

Filed Jan. 9, 1911.

C. C. BUMPAS, Clerk.
By A. O. BRACKETT Deputy.

17 PLAINTIFF'S FIRST SUPPLEMENTAL PETITION.

In the Circuit Court of the United States for the Eastern District of Texas.

Sallie C. Wulf
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Company.

Now comes the plaintiff in the above styled and numbered cause, and by leave of the court files this as her first supplemental petition, and for such says:

1. She excepts to the defendant's second amended original answer, filed herein, and says the same is insufficient in law; and of this she prays the judgment of the court.

2. She specially excepts to that part of defendant's special demurrer contained in paragraph five of its said answer, in which it alleges that the plaintiff was not the proper party to file this suit, because said demurrer comes too late, in that defendant filed its original answer to the merits of this cause on May 19th, 1909, making no objections to parties, and thereby waived all objections to the filing of the suit by the said Sallie C. Wulf in her individual capacity; of which she prays the judgment of the court.

3. For special exception plaintiff demurs to all that portion of defendant's second amended original answer which undertakes to set up contributory negligence on the part of the deceased, because the same is vague, uncertain, indefinite, and

states a conclusion, and fails to set out the specific acts of contributory negligence on the part of said deceased relied on by defendant; and of this she prays the judgment of the court.

4. For plea and answer herein plaintiff denies all and singular the allegations contained in said second amended original answer, except insofar as they are consistent with the allegations in plaintiff's first amended original petition.

5. For special plea and answer herein, plaintiff says that on the 19th day of May, 1909, defendant filed its original answer in this court, wherein it answered to the merits
18 of this case, and made no exceptions or objections to the party plaintiff, or the capacity in which plaintiff filed this suit, whereby it waived any objections as to the proper party plaintiff to this suit, and thereby waived any and all objections to the fact that the said Sallie C. Wulf originally filed this suit in her own name, in her individual capacity, as the sole surviving parent, next of kin and beneficiary of the decedent; of all of which she puts herself upon the country.

JAS. P. HAVEN,
J. H. WOOD,
Attorneys for Plaintiff.

Filed Jan. 6, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

19 MOTION TO SUBSTITUTE PARTIES.

In the Circuit Court of the United States for the Eastern District of Texas.

Sallie C. Wulf
vs. C. L. No. 111.
M. K. & T. Ry. Co.

Now comes the plaintiff in the above styled and numbered cause, and represents to the court that at the time she filed this suit there was no administration upon the estate of the decedent, Fred S. Wulf, and no necessity for any. That since the filing of said suit, to-wit: on the 4th day of January, 1911, the plaintiff has been appointed temporary admin-

istratrix of the estate of Fred S. Wulf, deceased, with full power to prosecute this suit as personal representative of the said Fred S. Wulf, deceased, and has asked that said administration be made permanent at the next term of the County Court. That under the laws governing such matters, the plaintiff is the sole beneficiary of whatever amount that may be recovered in this suit; that the same constitutes no assets of the estate of the said Fred S. Wulf, deceased, but go directly to plaintiff.

Wherefore plaintiff moves the court to allow her to amend and to prosecute this suit to its final termination as the personal representative of the decedent, for her individual benefit as well as in her individual capacity, that there may be no doubt as to the proper party plaintiff to this suit under the law.

J. H. WOOD,
JAS. P. HAVEN,
Attorneys for Plaintiff.

Filed January 6, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

20 MOTION TO REQUIRE PLAINTIFF TO ELECT IN WHAT CAPACITY SHE SUES.

Pending in the United States Circuit Court for the Eastern District of Texas, at Sherman.

Sallie C. Wulf
vs. No. 111.
M. K. & T. Ry. Co.

Now comes the defendant and moves the court for an order requiring plaintiff herein to elect whether she will prosecute this suit in her own right, or as administratrix.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant.

Filed January 9, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

21 MINUTES OF TRIAL.

January 6th, 1911.

Sallie C. Wulf,
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Co.

Ordered that defendant may amend and file first amended original answer.

(Order allowing plaintiff to sue as personal representative.)

January 6th, 1911.

Sallie C. Wulf
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Co.

On this the 6th day of January, A. D. 1911, came on to be heard plaintiff's motion to allow her to prosecute this suit as the personal representative of Fred S. ~~Hill~~ Wulf, deceased, as well as in her individual capacity, and the same being considered by the court, is granted, and plaintiff is authorized to prosecute said suit, both in her individual capacity and as personal representative, she being the sole beneficiary of whatever amount is recovered.

January 7th, 1911.

Sallie C. Wulf
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Co.

On this the 7th day of January, A. D. 1911, plaintiff allowed to file first amended original petition, and first supplemental petition and defendant allowed to file second amended original answer.

22 JUDGMENT AND VERDICT.

Tuesday, January 10th, A. D. 1911.

Court met pursuant to adjournment.

Present: Honorable Gordon Russell, Judge presiding. Dupont B. Lyon, U. S. Marshal, and C. C. Bumpas, Clerk, by J. R. Blades, Deputy.

When the court being opened in due form by order of the judge the following proceedings were had, to-wit:

JUDGMENT AND VERDICT.

January 10th, 1911.

Sallie C. Wulf
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Co.

On this the 10th day of January, 1911, this cause coming on to be tried, all parties appeared in person and by attorney and announced ready for trial; whereupon came a good and lawful jury, to-wit: Tom E. Davis, foreman, and eleven others, who were duly empaneled and sworn and who, after hearing the evidence, the argument of counsel and the charge of the court, retired to consider of their verdict; and after due deliberation returned into open court the following verdict, to-wit:

"January 10, 1911.

To the Honorable Circuit Court for the Eastern District of Texas.

We, the jury, in the case of Sallie C. Wulf against the M., K. & T. Railway Company find for Sallie C. Wulf, the plaintiff, a verdict for $7,000.00 cash money.

TOM E. DAVIS, Foreman."

It is therefore considered by the court and so ordered, adjudged and decreed, that the plaintiff, Sallie C. Wulf, in her individual capacity and as administratrix of the estate of Fred S. Wulf, deceased, do have and recover of the defendant, the Missouri, Kansas & Texas Railway Company, a corporation, the sum of seven thousand ($7,000.00) dollars, with interest thereon at the rate of 6 per cent per annum from this date, and all costs of suit for which let execution issue. The amount recovered herein shall be for the sole use and benefit of said Sallie C. Wulf, and the payment to her of said seven thousand dollars, together with interest and costs, as aforesaid, shall be a complete liquidation and settlement of said entire cause of action and shall acquit the defendant from further liability thereon.

23 AMENDED MOTION FOR NEW TRIAL.

In the Circuit Court of the United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf
vs. No. 111.
Missouri, Kansas & Texas Railway Co.

To the Honorable Judge of Said Court:

Now comes the defendant in the above styled and numbered cause, by leave of the court, files this its amended motion for a new trial, amending the original motion filed herein on January 11, 1911, and asks the court to set aside the verdict in this case and grant it a new trial for the following reasons:

I.

The court erred in overruling defendant's general demurrer to plaintiff's first amended original petition.

II.

The court erred in overruling defendant's special demurrers to plaintiff's pleading, the same numbered and reading as follows:

2. Defendant demurs specially to plaintiffs petition and says that said cause of action appears to be brought under the statutes of Kansas providing for the recovery of damages on account of injuries resulting in death, and alleges here damages at the sum of $40,000.00, while plaintiff is not permitted under the laws of Kansas to recover in excess of $10,000.00 on such cause of action.

3. Defendant demurs to the following paragraph in plaintiff's petition specially, to-wit:

> "He (deceased) was a locomotive fireman with the reasonable prospects for promotion to the position of locomotive engineer."

because the only materiality of such an allegation would be on the question of amount of recovery, and on that question
24 the proposition of promotion depended upon a great many contingencies and was too speculative to be considered in arriving at the damages sustained by plaintiff.

4. It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf that defendant was engaged in interstate commerce between the states of Kansas and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in interstate commerce between the said states and that said cause of action is not governed by the laws of Kansas.

5. Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an act of Congress passed in 1908, known as the Federal Employers' Liability Act, because at the time of the injury and death of F. S. Wulf defendant was engaged in interstate commerce between the states of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such interstate commerce at the time of his injury and death, and that such cause of action is governed by said act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf, and not to the plaintiff in this cause.

6. Defendant specially excepts to that portion of said amended petition making the said Sallie C. Wulf a party plaintiff in this cause, and shows that under the act of Congress, known as the Employers' Liability Act, she is not a proper party to said suit.

7. Plaintiff specially excepts to that portion of plaintiff's amended petition making Sallie C. Wulf temporary administratrix of the estate of said Fred S. Wulf, deceased, in this cause of action, because she was not made a party thereto as such administratrix at the time of the filing of the original petition in this cause.

8. Defendant specially excepts to that portion of plaintiff's petition wherein it seeks to make the said Sallie C. Wulf administratrix of the estate of said Fred S. Wulf, deceased, a party plaintiff in this cause, for it appears that said deceased, Fred S. Wulf, was killed on the 27th day of November, 1908, and the amendment making the said Sallie C. Wulf administratrix, as aforesaid, party plaintiff herein, as appears in plaintiff's amended original petition filed in this cause January 6, 1911, the same being more than two years from the

time the cause of action accrued in this case and the cause of action, if any, the said Sallie C. Wulf had on account of the death of the said Fred S. Wulf is barred by the limitation of two years.

III.

The court erred in overruling defendant's motion to require plaintiff to elect whether she would prosecute the suit in her own right or as administratrix.

IV.

The court erred in failing to give in charge to the jury instruction No. 1 asked by the defendant.

V.

The court erred in failing to give instruction No. 2 asked by the defendant.

VI.

The court erred in failing to give instruction No. 3 asked by defendant.

VII.

The court erred in refusing to give instruction No. 4 asked by defendant.

VIII.

The court erred in refusing to give instruction No. 5 asked by defendant.

26 IX.

The verdict of the jury is contrary to the evidence and without testimony to support it in that the overwhelming weight of the testimony was to the effect that the defendant had exercised all due care to provide the deceased with reasonably safe machinery with which to work, and exercised all due care to discover and remedy any and all defects in the engine and boiler.

X.

The verdict of the jury was contrary to the overwhelming weight of the evidence in finding that the explosion was not caused and brought about by the operatives upon the en-

gine allowing the water to get too low, thus causing the crown sheet to become heated, which caused the explosion.

XI.

The verdict of the jury is grossly excessive.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant.

Filed Jan. 19th, 1911.

C. C. BUMPAS, Clerk.
By A. O. BRACKETT, Deputy.

27 ORDER OVERRULING MOTION FOR NEW TRIAL.

January 19th, 1911.

Sallie C. Wulf
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Co.

This day came on to be heard in open court the amended motion of the defendant for a new trial, leave being granted by the court to file same and the argument of counsel thereon being heard and duly considered by the court, the motion is overruled by the court because it is the opinion of the court that the law is against the defendant and a new trial is denied, to which ruling of the court the defendant in open court excepted.

28 MOTION TO STAY EXECUTION AND FOR ALLOWANCE OF TIME WITHIN WHICH TO FILE BILL OF EXCEPTIONS.

In the Circuit Court of the United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf
vs. No. 111.
Missouri, Kansas & Texas Railway Co.

Now comes the defendant in the above styled cause and prays the court for forty-two days after the adjournment of this term of this court within which to prepare and present

to the court and have approved its bill of exceptions herein and that execution be stayed on the judgment herein rendered for forty-two days after adjournment of this term of this court.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant.

Filed Jan. 19, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

29 ORDER STAYING EXECUTION.

In the Circuit Court of the United States for the Eastern District of Texas, at Sherman.

January 19th, 1911.

Sallie C. Wulf
vs. No. 111.
Missouri, Kansas & Texas Railway Co.

On this day came on to be heard the motion of the Missouri, Kansas & Texas Railway Company for forty-two days after the adjournment of this term of court in which to prepare and file its bill of exceptions herein, and for stay of execution in this cause, and said motion and application being heard and understood by the court it is in all things granted.

It is, therefore, ordered, adjudged and decreed by the court that there shall be and hereby is granted to the defendant, Missouri, Kansas & Texas Railway Company, forty-two days after the adjournment of this term of this court in which to prepare and present its bill of exceptions in this cause.

It is further ordered that execution be stayed for forty-two days from and after the adjournment of this court and it is ordered that such stay shall be without security being given by the defendant, Missouri, Kansas & Texas Railway Company.

GORDON RUSSELL,
Judge.

Filed Jan. 19, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

30 BILL OF EXCEPTIONS.

In the Circuit Court of the United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Co.

On the trial of the above entitled cause on January 9, 10, 11 and 12, 1911, in the Circuit Court of the United States for the Eastern District of Texas, at Sherman, the Honorable Gordon Russell, district judge, presiding, the following evidence was introduced, proceedings had and exceptions reserved, to-wit:

The plaintiff introduced in evidence the deposition of Lee Lackey as follows:

My name is A. L. Lackey, and I am a boilermaker by occupation; am 28 years of age. Have been a boilermaker for 12 years, but have had no experience as a machinist. Do not know the plaintiff nor did I ever know the deceased, Fred S. Wulf. I examined the boiler of the engine which exploded and killed deceased on November 29, 1908, at the boiler
31 shops at Parsons, Kansas. Examined the stay bolts, boiler, crown sheets, radial stays, etc., and made a careful examination. I made no examination of the parts of the boiler I have testified about so far as measurements of the same are concerned, and therefore could not state the thickness. The crown sheet was very thin, but I did not measure it. Part of the stay bolts were new and part of them were not. They were worn and crystalized. The crown sheet could move up and down on the bolts. The heads of the stay bolts were round heads. There were no nuts used on any of the bolts on the lower side of the crown sheets. I have never seen square heads used in a fire box, but have seen hexagon and round heads used. The cause of the explosion of engine 488 was that the crown and side sheets and the stay bolts and radial stays were too weak to hold the amount of pressure of steam which the boiler is supposed to carry.

Cross Examination.

I appeared before the officer taking my deposition in answer to a subpoena served on me. Am not related to or connected with any one killed or injured in the explosion. Have been a boilermaker for 12 years. Worked for the Missouri Pacific 6 years, for the Frisco 2 years and for the M., K. & T. 18 months. For short periods worked for the Rock Island, San Pedro and the Kansas City Southern. Have made no tests of boiler material, but have handled and observed such material during the time I have worked as a
32 boilermaker. Do not know the thickness of the side and crown sheets of the boiler before the explosion. The appearance of said engine after the explosion did not indicate to me that the water was low. The crown and side sheets showed a number of burns, but from the color of the same they appeared to be mud burns. The difference in color would be due to the extent of crystalization. The giving way of the crown and side sheets was not at the place where the burns appeared. Mud causes the crown and side sheets to buckle or bag. It is usual for this to occur. It is not necessary to throw away the entire sheet, for it can be properly repaired. If the sheets are thick where the bags are, the bags can be knocked back in the proper place, and if the sheets are thin where the bags occur, they should be cut out and a patch put on. The threads of the bolts were worn off. They were not stripped or torn. Am a white man, American born.

DAVID FELTON testified for the plaintiff:

Am 34 years of age and reside at Parsons, Kansas. Am now and have been for five years a locomotive engineer, and have resided during that time at Parsons. Did not know the deceased, Fred S. Wulf. If he fired for me on a trip, I do not remember it. Remember the explosion of engine No. 488 near Idenboro, the first town south of Parsons, on the Osage Division. Saw this engine on the evening before it exploded about 6 o'clock. I broke the engine in on the 25th and 26th. That means that I was wearing down the bearings so that the engine was fit for service. I reported the
33 engine ready for service—that is, freight service—on the evening of the 26th, yet there was some work necessary to be

done on engine 488 which I reported on the evening of the 26th, and I do not remember at this time the reports I made on the engine, but the record books will show the same.

Int. 7. If in answer to the preceding interrogatory you have stated you made the following report and notations, to-wit: "11-25-08. Engine 488. Primer to inside injector will not shut off. Feed valve to inside injector will not shut off. Tighten throttle joints at fountain to inside injector. Cylinder cocks on right side will not shut off. Union to outside injector feed pipe under cab leaks. Wash out boiler. Did not run engine enough to say she is O. K.

(Signed) D. FELTON.
11-26-08.

Engine 488. Crown bolts leaking bad.

(Signed) D. FELTON.
11-26-08.

Engine 488. Wash out boiler. L slack sheet leaking. Crown bolts leaking. R. Cylinder cocks will not shut off. Both injectors leak. Reverse lever will not come back in full back motion, account rear end of quadrants sets too near boiler. Both primers leak so bad keep water running all the time and feed valves will not shut water off.

(Signed) D. FELTON."

To the seventh direct interrogatory he answers:

That was placed on the books by J. A. Kimmell through my request, and I found the troubles enumerated in the report. He placed it on the books on the evening of the 26th.
34 Do not know anything about whether the repairs were made or not.

WALTER F. YOCAM testified by deposition for plaintiff:

Am 36 years of age and reside at Mound Valley, Kansas. My occupation is that of an engineer and have had about 10 years' experience as such. Do not know the plaintiff and did not know deceased. Saw the boiler and fire box of engine No. 488 about two weeks after the explosion at the M., K. & T. shops at Parsons, Kansas, at the north end of such shops. In company with George Stidham I made an examination of the crown sheet, stay bolts and radial stays

comprising the fire box of said engine. I found the crown and side sheets torn. Some of the stay bolts were old and some of them were new. Some of the old stay bolts at the point where the inner side sheet gave way were badly corroded. Some of the old stay bolts appeared to be stripped and some of them worn. Would not be able to tell from the examination I made what caused the explosion. I examined the engine at the request of Mr. S. J. Sackett of Denver, Colo., about two weeks after the explosion. Am not related to or connected with any one injured or killed in the explosion of said engine.

Cross Examination.

Have never been employed as a boilermaker. Have never made any tests for the purpose of determining the necessary thickness of the side and crown sheets of a locomotive. Do not know the exact thickness of the side and crown sheets
35 of this boiler before it exploded. From the appearance of the side and crown sheets there was no indication to me that the water was allowed to get low in the boiler before the explosion. The color of the sheets did not indicate that the water was low. Uneven expansion and contraction causes crown or side sheets to buckle or bag. It is quite usual for it to occur. It is not necessary to throw away the entire sheet, as it may be properly repaired. It is not unusual to repair them. There is no reason why it should not be done. If the sheets is sufficient, it may be driven back, and, if not, it should be patched. If they were worn, they would be smooth, and, if they were torn, they would be rough. I am a white man and an American.

GEORGE STIDHAM testified by deposition for plaintiff:

Am 42 years of age and live at Mound Valley, Kansas. Am a stationary engineer and have had 20 years' experience with boilers and engines. Do not know the plaintiff and did not know the deceased during his lifetime. Had occasion to make an examination of the boiler of engine No. 488 in Parsons, Kansas, about two weeks after the explosion. I examined the side sheets and crown sheets and stay bolts. The

crown sheet had given way where it joins the side sheet on the right hand side about 10 or 11 stay bolts from the back end, and was bent downward and lapped over. A few of the stay bolts where the crown sheet gave way were worn and corroded at the place where they had extended through the crown sheet, and also above where they had extended
36 through the said sheet. At that point there were four or five stay bolts that were worn and corroded. From my experience, after my examination of a boiler that had exploded, I would have an opinion and judgment as to what had caused the explosion, and in my judgment the crown sheets and stay bolts were insufficient to withstand the pressure of steam at the point where it gave way, and in my opinion that was the cause of the explosion.

Cross Examination.

Was subpoenaed in this cause by the constable. I examined the boiler in question at the request of Mr. S. J. Sackett of Denver, Colo., about two weeks after the explosion north of the M., K. & T. shops in Parsons, Kansas. Am not related to or connected with any one who was killed or injured in the explosion of the engine mentioned. Have never been employed as a boilermaker and have never made any tests of a boiler. Can not state the thickness of the crown and side sheets before the explosion. The appearance of the engine in my judgment did not indicate that the water was low in the boiler before it exploded. The color and condition of the crown and side sheets did not show any burn except mud burns, and there was no indication of a burn where the same gave way except where the crack extended through a mud burn at the top of the crown sheet on the left side. Uneven expansion and contraction causes buckles and bags. It
37 is not unusual for this to occur. It is not necessary to throw away the entire sheet. It can be repaired. It is not unusual to repair buckling or bags in the sheets of a fire box. There is no reason why it should not be done if the sheet will stand it. If the sheet is sufficient it can be driven back and stayed. If not, it should be patched. Some of the bolts showed that the threads were worn off and others that they were torn off. I could tell the bolts upon which the threads had been worn off by the corroded condition of the bolt above where

it entered the sheet and by the smooth appearance of the thread. I am a white man.

MARK S. BARRICK testified by deposition for plaintiff:

Am 49 years of age, a boilermaker and reside at Coffeyville, Kansas. Do not know plaintiff and did not know Fred S. Wulf. I examined engine 488 about a month after the explosion at the shops at Parsons, Kansas. I think Geo. Melville was with me at the time we examined it, and we examined the side sheet and the crown sheet, and we found it split from the mud ring across the crown sheet to the seam on the opposite side of the side sheet. We found a number of the stay bolts and radial stays that were pulled through the sheet and the sheet was thin along where it was cracked, running from a quarter of an inch to five-sixteenths thick, where it should be three-eighths to seven-sixteenths. Examined the side sheets, crown sheets, stay bolts and radial stays. I found the side sheets and crown sheets thin, from a quarter to five-sixteenths thick. The crown sheet and side sheet were doubled back over the fire door. I did not notice any
38 mud burned places. From the looks of the stay bolts and radial stays, they were old. I did not notice the condition of the threads on the bolts as to whether they were torn or worn. Do not know the condition of the threads and bolts. Do not know whether the crown sheet could work up and down on the stay bolts. From my experience I would have an opinion only. My opinion is that it was a weak sheet, and the sheet being thin the stay bolts and radial stays pulled through the sheet.

Cross Examination.

Was subpoenaed as a witness in this case. Frank Melville was a nephew of mine, and he was the engineer of the engine at the time of the explosion. Have been a boilermaker 19 years; worked 14 years for the Santa Fe and over 4 years for the defendant. Have never made any tests to determine what thickness the crown and side sheets of a locomotive should be, and only know from my experience in having worked for railroads with such material. Do not know the

exact thickness of the side and crown sheets of the locomotive before the explosion, and only know what I observed after the explosion. From the appearance of the crown and side sheets it did not indicate to me that the water had been allowed to get low in the boiler, except for two or three red spots which were not at the place where the sheets gave way. The color of the sheets and their being thin were the things that indicated that the water had not been permitted to get low. Mud is the cause of the sides of the crown sheets of
39 the boiler buckling. It is not unusual for this to occur. It is not necessary for this reason to throw away the entire sheet. The same can be properly repaired. It is not unusual to repair buckling or bags in the sheets of the fire box, and there is no reason why it should not be done. If the sheet is of sufficient strength, the bags may be driven back and stayed; if not, the bags should be cut out and patched. I did not pay any particular attention to the threads on the bolts and could not state their condition.

J. S. SHIPPEN testified by deposition for plaintiff:

Am 31 years of age and live at Parsons, Kansas. My present occupation is restaurant work. On the 27th of November, 1908, I was conductor on the M., K. &. T. railway, and resided at Parsons, Kansas. Am not related to the plaintiff nor the deceased. I was never with the deceased, Fred Wulf, except when we were on duty. We were out on the road together on two trips. He was with me as fireman of the crew on the morning that engine 488 blew up. He was killed by the explosion. I was conductor of the freight train pulled by that engine and bound from Parsons, Kansas, to Osage, Oklahoma. Can not give the exact time we were called to leave Parsons on this date, but it was some time between five and six o'clock a. m., and we left some time between six and six-thirty. We were delayed in leaving Parsons on account of engine 488 not being able to get away from the roundhouse. I asked the engineer what was the matter, and he told me he had to get a machinist to fix the overflow pipe. He said it would not shut off tight. About four miles out of Parsons engine 488, which was pulling my train, ex-
40 ploded We had not been on duty to exceed two hours at the time of the explosion, and it would take about 20 minutes to pull our train out of the yards, line the switches and get

to the place where the accident occurred. I was in the caboose checking over my bills at the time the accident happened.

Cross Examination.

I did not notice the steam or water gauge as I was in the caboose at the time the accident happened. I was working as conductor on the freight train which engine 488 was pulling at the time of the accident.

MRS. SALLIE C. WULF, the plaintiff, testified in her own behalf.

I reside at Denison, Texas. Am the plaintiff in this suit and am also the administratrix of the estate of my deceased son, Fred S. Wulf. My said son died on the 22nd of November, 1908. His father was dead at the time he was killed and had been dead about five years. Fred S. Wulf was not a married man and had never been married and left no wife nor children, and I am his sole surviving parent. Fred S. Wulf was not quite 22 years of age at the time of his death. He was six feet three and one-half inches in height, and would weight 150 or 160 pounds, and was a well developed man. He was a healthy, strong boy, and had been strong as he grew
41 up. Fred S. Wulf was engaged as a locomotive fireman in the employment of the defendant at the time he was killed. At the time he was killed his headquarters were at Parsons, Kansas. He has been firing about two years, I think. He began work for the defendant at Denison. He worked first in the shops at the roundhouse and then as hostler. I know he worked with engines or something like that. Think he worked around Denison for the defendant about four months before he was set up as a fireman. While he worked in the roundhouse he received as wages $45.00 per month. Some months while Fred S. Wulf worked as fireman he got $60.00 per month, and at other times he was on the extra board. Some months he got $60.00 and some months $80.00. His average wages were between $60.00 and $70.00 per month. I believe I was mistaken in saying that he worked as fireman for two years. He probably worked for the company that long in all. Think he had been fireman about a month; that is, on the north end, and I think he worked as fireman on the

south end about a year. After he worked a year on the south end he went to Dallas and worked for a time in a furniture house there. Think he worked in the furniture house about nine months. He received as wages $50.00 per month. He then left Dallas and went to Parsons, Kansas, and again entered the service of the defendant as fireman. Fred S. Wulf was a sober man, energetic and paid close attention to his work. He did not idle away his time, but worked when he could get work to do. At the time of the death of Fred S. Wulf I had been a widow five years, and after the death of my husband Fred contributed to my support. I am still a widow, and have not married since the death of Mr. Wulf. After the death of my husband, my son gave me everything
42 he made. He would bring his checks and show them to me, and would then go to the bank and draw his money, and if there were any bills to pay he would pay them and bring the balance of money home to support the household. He would not reserve any of his wages for his own use, but if he needed money he would come to me for it. This had been his custom ever since he had earned anything. Fred S. Wulf was an affectionate son. He felt a great solicitude for my welfare and looked after me. He was my only son. I have two daughters, one of them being a widow and the other married. He was killed on Friday, November 27, and I saw his body Monday following. I saw him at Hennesy, Oklahoma, and went there in response to a message notifying me of his death. I am 55 years of age. For some years I have been in good health, but right recently I have not been very well.

Cross Examination.

The first work my son did was to work in a commission house at Dallas. Do not remember his age at that time. He worked with his father and continued in that position as long as his father lived, and his father has been dead about five years. Believe my son worked in the commission house about a year. We did not move to Denison for quite a while after that. After my son worked in the commission house he worked on the farm and worked with threshing machines, but I could not say how long he followed that work. He was 22
43 when he was killed and had been railroading about two years.

He first worked in the roundhouse at Denison cleaning engines. He earned $45.00 or $50.00 per month at that work. I lived in Denison at that time and had moved there from Oklahoma. I moved from Dallas to Hennessy, Oklahoma, and from there to Denison, Texas. I worked for Sanger Bros. in Dallas, and while at Hennessy I sewed. I did not work at Denison because I could not get work to do. I went from Denison back to Dallas and kept house for my son, and we remained there not quite a year and returned to Denison. I am acquainted with my son's signature. I last saw my son at Dallas before he went to Parsons. He went to Parsons to get work. He did not send me any money from Parsons because he had not worked long enough to get a check. Before he went to Parsons seeking employment he was working in a furniture house in Dallas, but was not earning enough for us to live on and he wanted to get back on the road. He gave me all his wages. Of course he had to have clothes and have money to pay for his board when he was away from home. He would buy meal tickets and the defendant would take the price of the meal tickets out of his wages before he was paid. The two papers which you exhibit to me bear the genuine signatures of my son, and the several other papers exhibited to me I identify as bearing his genuine signature. I worked for Sanger Bros. at Dallas about three months. I got as wages six dollars per week. When my son was killed I went to Denison and lived with my relatives for a time. I am keeping house now. I was born in Green County, Tennessee, January 29, 1855.

Re-Direct Examination.

44 Know the difference between a regular run and being on the extra board. Part of the time of the service of my son in the railroad employment he was on the extra board and part of the time he had a regular run. A regular run is where a man goes out regular and has a steady position, and being on the extra board means that he only goes out when called to go on extra trips and there is no certainty as to how much time he will put in or what his earnings will be. I could not say whether my son had a regular run at Parsons or was on the extra board. At the time my son was killed he had not

been working out of Parsons long enough to receive a pay check.

O. J. BELDEN testified for plaintiff:

Reside in Sherman and am engaged in the insurance business, and have been in the business about 25 years. Am familiar with the mortality tables used by the various life insurance companies, and this table is gotten up by the actuaries of the various insurance companies of the United States, and is based upon the experience of such companies. That table is universally recognized by the various insurance companies as showing the expectancy of life of persons of various ages. This table which I hold in my hand is sent to me by the company I represent. I have never printed a book of this kind, and my knowledge of the mortality table is gained from my experience in the insurance business. The expectancy of a man 22 years of age is 40.85 years.

When the foregoing testimony relative to the contents of the mortality table was offered to be introduced by the
45 plaintiff the defendant interposed the objection that the same would be in the nature of secondary evidence and hearsay and that the witness had not shown himself qualified to testify relative to the contents of such table. These objections were overruled by the court and the witness permitted to testify as above shown. To this ruling of the court, and to the action of the court in permitting such evidence to go before the jury for their consideration, the defendant in open court excepted and still excepts and in this behalf tenders its bill of exceptions.

Cross Examination.

The life expectancy of a person 56 years of age is shown to be 16.72 years. The table is based upon insurable persons. Of course the length of time an individual would live would depend on the condition of his health to a very large extent. The table merely represents the actual experience of the insurance companies based upon the life expectancy of insurable persons. Of course they take persons who have passed medical examinations and make the estimate from those.

WOODS RHODES testified for plaintiff by deposition.

Am 47 years of age. Reside at Parsons, Kansas, and am employed by the street railway company as machinist and boilermaker. Have followed this business 17 years, 12 years of which was in the service of railways. Saw and examined the boiler which exploded, causing the death of Fred S. Wulf
46 about two weeks after the accident, and it was then in the defendant's shops at Parsons. Made a careful examination. The crown sheet was three-sixteenths of an inch thick. Some of the stay bolts were new and some were old, and some were eaten up by rust. Some of the stay bolts had round heads and some square heads, and on some of them nuts were used and some were riveted. The bolts with square heads are used because they cover more surface of the crown sheet, and they have a square nut tapped out to fit the stab bolt. The explosion in my judgment was caused by a weak crown sheet.

Cross Examination.

Am not related to any one killed or injured in the explosion. Have never made tests to ascertain the strength of a crown sheet; all I know is from observation and experience. The condition of the exploded boiler did not indicate that the water in the boiler had been permitted to get low, but my judgment is that the explosion was due to a weak crown sheet. Scales sometimes cause weakness in a crown sheet, but this can be remedied by putting in new stay bolts, or, if the crown sheet is cracked, a piece can be cut out and a patch put on. Some of heads of the stay bolts were torn off. Am a white man.

47 J. P. MALLEY testified for defendant:

Live at Springfield, Missouri, and am general foreman of the boilermakers of the Frisco system. I have no connection with the defendant. I have charge of the supervision of the boiler department of the Frisco and look after the construction and maintenance of boilers. Have had an experience of 21 years as such foreman. On the 4th of December, 1908, I inspected the boiler of engine 488 belonging to the defendant, and which I understood had exploded November

27. I was directed by the superintendent of machinery of the Frisco to go to Parsons and report to Mr. O'Herrin, and Mr. O'Herrin referred me to Mr. Mattox, superintendent of machinery of the defendant, and he showed me the boiler, of which I made a careful examination. In my judgment based upon the examination I made the explosion was caused by the water being low in the boiler. A radial stay means a stay bolt that connects the roof sheet of the boiler with the crown sheet, and the crown sheet is the roof sheet of the fire box, and the radial stays hold the sheets together. A stay bolt is a bolt that holds together the side sheets and outside run of the boiler. The crown sheet is the roof sheet of the fire box, and the fire box proper is where the fire is built that heats the water in the boiler. Around the fire box are stay bolts and radial stays. The water in the engine is around the fire box. The water goes in at the forward part of the boiler; it goes through an injector and into the forward part of the boiler. The space around the fire box is three or four inches wide and in some engines five inches, and the space at the top of the fire box is twenty-three to twenty-eight inches, varying in different engines. The stay bolts are usually four inches apart from center to center, and the bolts that come
48 down from the top are about the same distance apart. The water comes up on the sides of the fire box and over the top of it, and that forms the steam to supply the engine. The steam dome is located ahead of the fire box on top of the boiler. The steam comes down from the steam dome through a pipe into the steam chest and into the cylinder. The pressure of the steam would be the same at all places, except at the bottom there would be added to it the weight of the water. The side sheets are usually five-sixteenths of an inch thick and the crown sheet three-eighths of an inch thick. The side sheets are sometimes thicker than the crown sheets. I think the explosion was caused by the water getting low and down below the crown sheet, thus allowing the crown sheet to become hot. I base the opinion on the discoloration of the crown sheet and the bagging of the sheet between the radial stays. The stays had pulled; that is, they had become elongated and this was produced by the heat. They became so intensely hot that they stretched. If the explosion had occurred from any cause other than low water, and the boiler had blown up, I

do not believe the stays would have become elongated. The threads were stripped off the radial stays. That would not have been possible if there had been water on top of the crown sheet.

Cross Examination.

Have been working for the Frisco about 10 years. I
49 was ordered to come here as a witness by the superintendent of machinery of the Frisco at Springfield, Missouri, and he is the man who told me to go to Parsons on the 4th of December and inspect the engine. Gus Molison of Topeka, Kansas, also went there to examine the engine. I believe he works for the Santa Fe. Mr. Mattox, superintendent of machinery of the M., K. & T. at Parsons, was also there. He pointed out the engine to me, and I examined it to my own satisfaction, and was alone when I made the examination. I could not state how many times I have testified relative to exploded boilers, but not a great many times. I came to no conclusion until after I made an examination of the engine, and then it was my opinion that the explosion was due to the low water in the boiler. I do not know that low water will cause the crown sheet to burn. The crown sheet might burn from mud being on it. I examined the engine for about an hour in the morning and went back in the afternoon again. Parsons is a division point on the defendant's line of railway. The engine would be supposed to come out from the roundhouse supplied with water and coal. The distance that an engine will run on the road between water stations depends on the size of the tank and the size of the engine. I could not state how long or how far an engine will run without being supplied with water. I am not an expert at running an engine, and could not state how much water it takes to run one. I do not know where the engine exploded and did not ask. Low water is the only thing I know of that would cause an engine to explode. I based my judgment as to the cause of the explosion on the appearance of the crown sheet and thought that was sufficient. The portion of the engine that goes over the back of the boiler is called the wagon top. The
50 fire box is under the boiler and to the rear of it, and there are flues running from the front end of the fire box to the front

end of the boiler. The fire that is put in the fire box causes the heat to go through the flues and heat the water. The wagon top is riveted on to the outside. The bolts run straight through the side of the fire box to the outside of the boiler and they are called radial stays, and when they come some distance to the side and outside of the boiler they are called stay bolts. They perform the same purpose as the stay bolts; that is, the radial stays and stay bolts perform the same purpose. They are fastened with nuts or rivets and have a washer next to the boiler. The radial stays on this boiler were fastened with nuts and the stay bolts bradded or hammered up. It is necessary to have the stay bolts and radial stays of sufficient strength to resist the pressure of the steam in the boiler. Did not find any of the stay bolts or radial stays with worn threads, but the threads were stripped on them. I could not state the number that were stripped because I did not count them. I would estimate it at 160. The crown sheet was split right through the middle. The crown sheet was solid before the explosion. The crown sheet was fastened to the side sheets on top, and it had a seam at the top where the radial stays began on each side. The crown sheet was bursted right through the top in the center and crosswise. When it split the top of the crown sheet went down to within eighteen inches of the mud ring. It tore down the right side sheet and a part of the left one, and the crown sheet was fractured at different places a little bit. The entire crown sheet was bursted in two, and the left side sheet went down within eighteen inches of the mud ring, as before stated. The mud ring is the foundation of

51 The front end of the crown sheet went down against the flue sheet and the other half went down to the door sheet. The crown sheet came down to within eighteen inches of the mud ring on the right side and to within twenty-four or twenty six inches of it on the left side. It was not a straight, even break, but was torn, and the break was diagonally across. I did not carefully examine each one of the stay bolts and radial stays that had the threads stripped, but glanced over all of them. I examined the radial stays more particularly than I did the stay bolts. I did not carefully examine every one of the bolts. I could tell that the threads were stripped and not worn off, for I made a careful enough examina-

tion to do that. The bolts are four inches apart from center to center, and they are so placed in order to withstand the pressure of the steam. I do not know that when an engine is running the water is sloshing about in the boiler. I do not know that the motion of the engine agitates the water. I do not attempt to state as to that, for I do not know anything about it.

Re-Direct Examination.

In the construction of boilers the strength of the material used in their consideration and the construction is made with a view to the factor of safety. It is figured out the amount of pressure the material will stand, and the entire structure is built with a view to safety. If the material will
52 stand a pressure of 1,000 pounds, it is estimated that it is safe to stand 200 pounds steam pressure in the boiler. In an engine of this kind there are from 1,000 to 1,500 stay bolts and radial stays. Where there is 200 pounds of steam pressure I do not believe the motion of the engine would slosh the water to any extent.

Re-Cross Examination.

I know something of the tensile strength of steel, and I know how much pressure steel of a certain thickness and strength will bear. Where the thickness is three-eights of an inch the tensile strength is 55,000 pounds. We get this from an actual test and the books also. When an engine is sent into the shops for repairs and the repairs are made it is proper to test the engine before it again goes into service. They ought to test 25 per cent more than the working pressure. I recognize the picture you show me as a fair representation of the condition of the boiler after the explosion. All four of the pictures you show me are a fair representation of what they purport to represent. The fire box had not been removed from the engine when I saw it nor had the wagon top. The wagon top was in place. I could not say as to whether it had been taken off and put back in place. The bluish color of the metal to my mind showed that the explosion was produced by low water in the boiler. Could not say whether the fire was put out by the explosion or whether fire remained in the fire box after the explosion. In my judgment the

crown sheet was burned before the explosion took place and that this blued the metal. The metal does not show a blue
53 color from a mud burn. There was also buckling in the boiler between the stay bolts. In my judgment an explosion of a boiler would blow all the fire out of the fire box and none would remain after the explosion.

C. I. EVANS testified for defendant:

Reside at Parsons, Kansas, and am traveling engineer for the defendant. I have been a locomotive engineer since January 27, 1890, and have been traveling engineer since November 1, 1905. The duty of the traveling engineer is to ride on the engines in service and see that they are operated and fired to the best advantage. He does not run an engine regularly as does a locomotive engineer on the road. Generally speaking, I am familiar with the construction of a locomotive engine. I saw engine 488 about two hours after it exploded. I was notified of the explosion about seven o'clock in the morning, but could not state the exact time it occurred. I went to the station, and in company with Mr. Mattox went to the scene of the accident. I examined the engine to ascertain the cause of the explosion, and in my judgment the explosion was produced by low water in the boiler and consequent heating of the crown sheet, and my reason for this opinion was that the crown sheet was a bluish color and the condition of the holes where the radial stays had been, and the color of the radial stay and ends of the stay bolts. They were a dark blue as if they had been exposed to the fire. A mud burn will produce a kind of pouch, and does not show any color; if the color could be seen on the
54 inside it would probably be blue. In a mud burn there is usually a pouch between the stay bolt holes, and it does not show the color. The crown sheet had burned down into the fire box, and the inside of the crown sheet was smooth, and that indicated to me that the water was low. The color of iron is a bluish grey, but when it is subjected to intense heat it turns blue, and that was the color of the crown sheet. Of course on the inside of it there is more or less deposit of lime from the boiling of the water under ordinary conditions, but when it is subjected to heat that deposit cracks up, and it falls off the

crown sheet and the metal turns blue. The crown sheet is supplied with long radial stays screwed into the sheet, and these were stretched and elongated. They had been pulled out of shape, were not circular, but rather oblong, and that indicated that the crown sheet had been softened from heat. That would be due to the exposure to the heat without any water on it and the pressure. There was also a slight thinning of the crown sheet due to heat and pressure.

Cross Examination.

Am not a machinist and am not a boiler maker. I know nothing of the tensile strength of steel and nothing of the scientific methods of construction of the engines used by the defendant. Do not know the amount of pressure that a certain number of stays will hold. I have worked for different roads as engineer, fireman, roundhouse foreman and hostler. My
55 duty as traveling engineer is to ride on the engines in a certain territory and see that they are properly handled and fired in order to get the best service from them, and to keep a record of the general conditions. I am on the engines as the representative of the company and working for it. About all I know about locomotives is running them and taking care of them. I have never constructed an engine, and all I know about their construction is from handling them and what I have read. The run on the Osage Division is 170 miles. Engine 488 had started from Parsons, Kansas to Osage, Oklahoma. The engineer of the exploded engine was Frank Melville. He was killed in the explosion. Fred S. Wulf was fireman and he was killed. The head brakeman was injured, and the rear brakeman was unhurt and the conductor was unhurt. The train was a through train and the explosion occurred three miles from Parsons, which would be about a 15 minutes run. The next water station from Parsons in Pumpkin Creek, fourteen miles from Parsons. After leaving Parsons some of the freight trains take water at Mount Valley and some at Coffeyville. When the train goes out of Parsons for the initial run it is supplied with coal and water and sand. It was about 15 minutes after engine 488 left the yard that it blew up. Did not examine the injector of engine 488. The injector blew off in the explosion. If the injector was work-

ing, the engineer could look at the water gauge and tell how much water was in the boiler. If the injector was working properly and the water gauge showed it, there was no reason for there not being enough water in the boiler, provided the engineer put the injector to working. It is the duty of the engineer to work the injector and keep a certain amount of water in the boiler. If the engine is running and the track is rough,
56 the water will slosh about in the boiler. Water seeks its level and if the water gauge is working properly, it shows how much water is in the boiler. If the injector works properly, there is no reason why there should not be water in the boiler. I do not recollect that I talked to anybody who had picked up the men that were killed. I believe the body of Wulf was picked up 150 yards from the track; it was either 150 yards or 150 feet from the track. I believe the engineer was found right by the side of the caboose. The water from the boiler was scattered around considerably. When I first arrived at the scene of the wreck I went to work to get it cleared so the passenger train could get by. My recollection is that I saw where the water had been thrown to a hedge fence near the right of way. That hedge was on the fireman's side of the engine. The boiler was blown to the south and east of the track. The boiler was 430 feet from where the explosion occurred and 130 feet from the track. The boiler had cooled off when I got there. The explosion did not knock the wagon top off, but it split the fire box. Could not say how many radial stays and staybolts were jerked out of the crown sheet and side sheets. There was a rupture that extended clear around the left hand side of the crown sheet, but it did not go around on the right side at all scarcely. I looked the bolts over pretty carefully. I could not say that I looked at each one individually, but I looked the bolts and sheets over carefully. I looked at the rupture and the general condition of the sheets. After I examined the engine I reached the conclusion that the explosion was caused by low water in the boiler, and I reached such conclusion for the reasons heretofore stated. There has to be a hot fire in the fire box in order to generate steam to
57 run the engine. The rupture extended about three rows of staybolts into the side sheet below the crown sheet. On top of the crown sheet the metal was blue. The rows of staybolts about four inches apart, and the side sheet was blue for nine

inches below the crown sheet. When there is water on the metal of the side sheets and crown sheets, it will not turn blue. It is easy to tell by looking at a piece of iron whether fire has been applied to it. If you heat a piece of iron and stick it in the water while it is hot, it will turn a kind of brownish red color.

J. C. GILLIS, testified for defendant:

Am a boiler maker in the employ of the defendant and reside at Parsons, Kansas. Have been an inspector of engines for three years, and prior to that time worked as boiler maker. I remember engine 488 that exploded near Parsons. Just to satisfy my own curiosity, I examined the boiler after the explosion. From my examination of the boiler my conclusion was that the explosion was caused by low water, and my reasons for that conclusion were the color of the metal, and the holes for the bolts being stretched, showing that it must have been practically red hot, else the iron would have bursted and cracked around the holes, and the metal being perfectly blue showed that it must have been red hot at the
58 time. I examined the engine before the explosion when it came into the shops, but I don't remember the date of the examination. I examined it again about a week before it went out of the shops after the work was done on it, and I found everything satisfactory. That may have been some ten days before the explosion. I inspected it as soon as it came in for overhauling, and then made another inspection after the work was done. I found the work had been done properly, and that the engine was in first class shape.

Cross Examination.

I have worked 23 years at Parsons with the defendant. I repair boilers at Parsons. I did not do any of the work on engine 488, but only made the inspections. I do not have the work done. I make an inspection of the boilers and then turn in my report to the foreman and he has the work done. If the foreman says to have the work done, it is then done under my direction. The explosion occurred on the first trip the engine attempted after it was repaired, and it had gone

about three miles when it blew up. As soon as I examined the engine I knew it blew up on account of low water in the boiler, and had no doubt as to this in my own mind.

59 I knew the engine was broken in the day before it went out, but I did not know who did it. I knew the engineer made a report on it. I did not see the report; it goes to the roundhouse. After an engine leaves the shop, it goes to the roundhouse, and I don't know anything about it. I know the engine was in good condition when it left the shops. I know it could make the trip all right. I never did see the report signed D. Felton, and which you read to me, and which appears in Felton's deposition. Notwithstanding that report, I am willing to say engine 488 was in good condition when it left the shops. This was the first trip the engine attempted to make after it left the shops, and it exploded three miles from Parsons. Repairs of the kind mentioned in the report of Felton are made at the roundhouse. The repairing, patching and heavy work is done in the shops, and minor repairs are done in the roundhouse. The roundhouse foreman is not here. The night foreman is here, but the day foreman is not. We do not have the same night foreman that was working at that time, but the day foreman is the same man. Engine 488 was tried or broken in in the day time It was the duty of the employes in the roundhouse to right the engine after Felton's report was made. Felton, the engineer who broke in engine 488, is not here.

Re-Direct Examination.

After the back shop, being the repair shops, repair an engine, it is sent out to be broken in, and then if any minor repair are reported as necessary to put the engine in perfect condition for the road, it is sent to the roundhouse and the work done there. It does not come back to the shops where I do the inspecting.

60 E. G. QUINLAN, testified for the defendant:

Live at Parsons, Kansas, and am a boiler maker, and this has been my business at Parsons since March 4, 1897. There was an interval of three years between March, 1897, and this date that I worked for roads other than the defendant. Was

working at Parsons in November, 1908, and remember when engine 488 exploded. Do not remember who broke that engine in before it started on the trip. I work in the locomotive shops, which is a place different from the roundhouse. I did some work on engine 488 between the 5th and 15th of November, 1908. I put a patch on the left side sheet, cleaned off the crown sheet and renewed two belly braces, re-drove the stay bolts on each side sheet and the door sheet. After the engine leaves our shops it is taken and tried out, and this engine did not come back to our shops any more after it was tried to my knowledge. Saw engine 488 about four or five o'clock the evening after the explosion. I could tell from the appearance of the fire box and boiler what caused the explosion. My opinion is that the explosion was caused by the water getting down below the crown sheet. I judge this from the color of the bolts and the sheet; they were a kind of a blue color, and anybody that works with and heats steel and iron knows that color. It turns blue when it gets to a certain degree of heat, and I form my judgment of the cause of the explosion from my experience of handling and working with metal.

61 Cross Examination.

I work in the back shops and repair boilers. My work is marked out by my foreman and I do not inspect boilers. After the work is done there is a man whose duty it is to inspect the boilers and see that the work is properly done. That man is Mr. Gillis who has just been on the witness stand. He fills the boiler with water and inspects it. I do just what I am told to do, and have no supervision over the work. I put a patch on the left side sheet and re-drove quite a number of old bolts on the right side sheet, and I put some new bolts in the crown sheet just in front of the fire box door. I also drove out a number of bags in both the side and crown sheet. Do not think the bags were caused by a mud burn; a bag or buckle is a depression in the side or crown sheet. I never made a statement to Mr. Melville's widow that I drove bags out of both the side and crown sheets which were caused by mud burns, and that I remove the bolts and redrove the bolts after the bags were driven out. I did not make any such statement as that to the attorney for Melville's widow. I did drive

some bags out of the side sheet. I might have driven out 8 or 10 or 12 or fifteen bags out of the side sheet. There was a crack in the left side sheet and I put a patch on there; that patch was put six inches from the top of the side sheet and just about the center. The left side sheet was not torn by the explosion. The tear did not come in three feet of where I put the patch. I presume the whole crown sheet came down but not on the left side. The crack started in the crown sheet right at the flue sheet, and went to the right side of the crown sheet, but I don't know whether it cut off the corner of the crown sheet or not. The sheet was torn about two-thirds of the way across, but the crown sheet on the left hand side was not
62 torn entirely in two. There was no sediment on the inside of the boiler; I had cleaned that off. I cleaned the crown sheet off and examined it to see that everything was all right. I saw the engine north of the boiler shop the evening after it blew up; it was about two blocks from the shops. The crown sheet was blue across the top, but was not blue down to the mud ring. The iron was blue down as far as the sheet had got hot on account of low water. The blue showed higher in the center than on either side. It got hot down the side sheet two inches in the center. It had not been hot for three rows of stays below the crown sheet. I am certain of that. There are two sets of boiler makers at Parsons, one at the roundhouse and one at the boiler shops. Radial stays are solid, they are not hollow. If the boiler leaks around the stays, that is corrected. We put flues in at the shops. The boiler makers can not do my work at the roundhouse, but I can do at the shops anything they can do at the roundhouse. Heavy repairs are done at the shops and the lighter repairs at the roundhouse. I put a patch on the fire box, but that did not have anything to do with the explosion.

GEORGE ALTEMEYER, testified for defendant:

I reside at Parsons, Kansas, am a boilermaker and work for the defendant, and have so worked four years and a half. Remember when engine 488 exploded in November, 1908. I did some work on that engine at the roundhouse; do not remember who broke the engine in. When an engine is taken out to be broken in and defects are found in it, such defects

are reported. When engine 488 came to the roundhouse I looked at her with steam on to see where the leaks were. I
63 presume the engineer who tried the engine reported her condition. He writes his report in a book. I last saw engine 488 the night of the 26th of November before the explosion which occurred on the morning of the 27th. I saw the report of the engineer in reference to what was the matter with the engine. The report showed that the side sheet and crown sheets leaked, but I do not remember anything else the report showed. I saw the engine between 9:30 and 10 o'clock the evening of the 26th. I do not know what the engineer's report on this engine was; I just do the boiler work. The other parts of the engine are out of my line, and I do not make the repairs. I got Felton's report from the book and proceeded to work on the boiler. I made the necessary repairs on the night of the 26th. I work nights. O. H. Rodgers assisted me in making the repairs. When I made the repairs indicated in the report of Mr. Felton, the engine was in good condition. I examined the fire box of the engine after the explosion, and this examination was made on the night of the 27th, and I examined it again a day or two afterwards. From my experience in working on and handling boilers I could tell what caused the explosion. It was caused by low water. The crown sheet was blue and the bolts were blue, and that indicated that the water was too low in the boiler causing them to heat. The crown sheet was broken by the explosion.

Cross Examination.

I work in the round house where the lighter repairs are
64 done. Rodgers is here. He and I worked nights. We fixed the engine that night after Felton reported it in bad fix. We fixed the boiler. The other part of the work it was the duty of the machinist to do. I worked on the inside of the boiler and could not tell who the machinist was who worked on the engine. I do not know who was working on the outside. I did not see anybody fix the injector. The boiler was flooded with cold water after my work was done. The boiler was filled with water that night. I could not say how much water was in it when it went out on the road. There was nothing to take the water out of the boiler that I know of. I do not know anything about how much water would be consumed

in running the engine three miles. The glass was half full of water when I left the engine that night, but I could not say how far that would take it above the crown sheet. The glass is for the purpose of showing how much water is in the boiler. The boiler washer fills the boiler with water. They fill it ready for the fire. I figured that a half glass of water was plenty. I do not know how full they keep the boiler on the road. I thought with that much water it was ready to go on the road. The boiler washers are instructed how much water to put in a boiler. The boiler washer is not here. I left work at six o'clock that morning and the boiler was filled at that time; I left that engine at 12 o'clock the night before the explosion and went to Osage. I do not know anything about the injector and have nothing to do with that portion of an engine. I know the boiler was washed out. The left side sheet was repaired. That was caused by the stay bolts, twenty-five or thirty of them not being tight. Two men go on the inside of the boiler and tighten the stay bolts; the heads are hammered. We hammer the head of the bolt enough to make it fill up the hole and keep the water from coming through. I do not think hammering the bolts weakened them. That is done the same as driving a new bolt, and there is no reason why it should weaken the bolt. I had nothing to do with the
65 reverse lever not coming back. I do not make that kind of repairs. I have stated that all the work I do on an engine is as a boiler maker doing boiler work. There were two new crown bolts in the crown sheet that leaked and that was remedied. They were right over the fire door in the center of the crown sheet. The fire door is next to the cab. I located the leaks and marked them while the engine had water in it, and then proceeded to make the repairs, and afterwards the boiler was filled with water to see if the leaks had been stopped. I found leaks on both side sheets, right and left, caused by the bolts not being tight, and this was repaired. After the explosion I looked at the boiler. The tear of the sheet did not extend down to the mud ring, but I could not say how far it did come down. It was broken some on the side, but I did not measure it. I do not know where the first break occurred. I did not look at the water marks on the crown sheet, but looked at the top of the crown sheet. Davis is not here. I

did not understand that the engine leaked so badly that it would not steam.

O. H. ROGERS, testified for defendant:

Live at Parsons and am a boiler maker working for the defendant, and have been so engaged ten years. Remember when engine 488 exploded near Parsons, Kansas. The explosion occurred November 27, 1908. I worked on the engine the night previous to the explosion with Mr. Altemeyer; we calked up around the crown bolts and drove the stay bolts
66 on the side sheets. We did that because they were leaking, and that stopped the leaks. The boiler was afterwards filled with water and did not leak. I examined the boiler after the explosion, and the explosion was caused by low water in the boiler and consequent heat.

Cross Examination.

I was a regular boiler maker at that time. Engineer Felton had the engine breaking it in, and he reported certain defects in it and that is the reason we made the repairs. I saw the report, but would not remember all of it. Do not remember the report stating that the injector would not shut off. Felton report which you read to me I presume is the one I saw, but I do not remember all that is in it. All we did was the work on the boiler. The other things come in the machinists' department, and with them we have nothing to do. Do not know whether the machinists worked on the engine that night or not. I would not have paid any attention to their work. Altemeyer and I were inside the engine. I remember that the report said to wash out the boiler; that the left side sheet was leaking and crown bolts leaking. We had nothing to do with the cylinder cocks. We marked the places that were leaking and proceeded to make the repairs. We drew the water off and worked on the boiler. We did not put in any new crown bolts. We set the bolts against the sheet and cut them into the sheet and that is called calking. We set the bolts against the sheet tight, that is, drove the head of the bolts back against the sheet. There would be a space around the bolt that the water would come through and we would repair that. We set two bolts

67 in the crown sheet just over the fire door. We drove up the stay bolts on the left side sheet. We drove them up with a hammer until the heads of the bolts were against the sheet. I think 27, 28 or 30 of the bolts were in that condition and were fixed. There were no buckles in the side sheet when I was in there. I saw a patch on the left side which was probably 24 inches long. That fire box was not large enough for a man to stand up on the inside of it. The left side sheet is riveted onto the crown sheet. The side sheet is about four feet wide. There were stay bolts leaking around the patch, but I could not say how many. We began working on the boiler about nine o'clock at night and worked on it until 11 or 11:30. After we got through the boiler was filled to see whether it would leak or not. We put in a half glass of water, but I don't know how much that would come above the crown sheet. The object of the water glass is to show the amount of water in the boiler. A half glass of water would carry the water over the crown sheet. The boiler showed no leak, but I did not see it after it was hot. The explosion happened three or four miles out of Parsons, and that would be a 10 or 15 minutes run. It was our business to fix the boiler and we did fix it. The fact that a boiler leaks does not necessarily weaken it, and I have seen new boilers from the factory that leaked. I reported to Mr. Mattox that the boiler blew up on account of low water. I do not know the boiler leaked that morning before it left the yards, and I do not know that they were delayed in geting out on account of the leaking of the boiler.

H. T. ROUSLER, testified for defendant:

Am roundhouse foreman of the defendant at Osage, Ok.
68 In November, 1908, I was the defendant's round house foreman at Parsons, Kansas, and worked nights. Know engine 488 that blew up near Parsons, and I remember the occasion of the explosion. I rode on the engine the morning it blew up; it was then in the freight yard pulling out. We did a half hour's work on the engine that morning. Frank Melville was engineer; we did some work on the oil pipe and fixed the steam chest and pipes; the pipes were leaking. That was all the work we did that I remember. The engine was newly out of the

shops, and they always need a little touching up before they go out, little odd jobs to be done on them. I rode about 7 or 8 blocks on the engine that morning. Noticed the working of the engine and the water gauge. The engine was working all right and I paid particular attention to the water glass. The water gauge and injectors were all right. It showed two-thirds of a glass of water when the engine was working leaving the yard.

Cross Examination.

The engine came out of the back shops. I do not know that it was an old engine and came from Denison to be worked over. I worked in the round house at Parsons, and was round house foreman. The place I have at Osage is a better place than the one I had at Parsons. I put Felton out to break in the engine and saw his report, and the one you read to me from his deposition is the report I saw. I did not send the engine out under Melville in the condition it was reported by Felton. After the engine had been worked on and turned over to Melville he came to the round house for some work to be done on it. We did the work, and I asked Melville if he was satisfied to go and he said he was. He lost his life after he
69 had gone three miles from town. I was round house foreman over both the boiler makers and machinists. He tried the injector and it was all right and the water glass was two-thirds full, and he said he was satisfied to go. The water goes down on each side and over the top of the fire box. The water goes up on each side until it gets over the top of the crown sheet; with the water glass two-thirds full, I presume the water would be six or seven inches over the crown sheet. The water glass registered properly the amount of water in the boiler. The water must have got away from them for the engine to have blown up after a three mile run. A man can pull an engine out of the yard and waste a glass of water. The water had to leak out or be exhausted in making steam. I was on the engine ten minutes before it blew up and I know the injectors were working all right for water was being pumped into the boiler. I would not be positive, but I think the engineer had the injectors pumping when I got off the engine at the depot. The boiler is sufficiently full for all purposes when the water

comes six or eight inches above the crown sheet. You can use a boiler full of water in starting thirty cars out of the yard at Parsons, and he had a heavy train. If the water is wasted the water glass will show that fact. He had worked the engine up and down the yards to see if it worked all right, and when he left there he had two-thirds of a glass of water. When I got off the engine the train was moving and pulling out of town. The engine then showed two-thirds of a glass of water and in three miles it blew up. When the engine left the yards it was in shape to go on any run. I had a machinist and helper working on the engine, but I don't remember their names. They are not here. I think Anderson did the work. I don't know where he is. I am supposed to have the work done, but Gillis was the inspector, and then we had an engine
70 inspector named Whalen. He does not have anything to do with the engine except to look over the machinery. Whalen is not here.

G. MALISON, testified for defendant:

Live at Topeka, Kansas, and am boiler inspector for the Santa Fe Railroad. I have held that position six months. Before I was engaged at that work I was foreman of boiler makers and I have followed the busines of boiler maker 35 years. I examined the boiler of engine 488 at Parsons, Kansas, December 3, 1908. I could tell from an examination of the boiler what caused the explosion. It was caused from low water.

Cross Examination.

I was sent there by the Santa Fe to make the inspection. Mr. Malley was there at the same time. I had known him before. We did not inspect the engine together and I did not talk to him about it. I have examined ten or fifteen engines that have blown up, and have seen others that blew up from low water. If an engine blows up from low water, it is the engineer's fault, and when it is blown up on account of weakness, it is the fault of the company. I always report them blown up from low water; that is correct.

Re-Direct Examination.

I never inspected an engine that was blown up from any other cause than low water. I have never inspected an engine that exploded that the explosion was from a cause other than the water getting below the crown sheet.

71 J. C. ARMSTRONG testified for defendant:

Live at Parsons, Kansas, and am chief clerk to the master mechanic of the defendant. Knew Mr. Wulf, the fireman who was killed in the explosion near Parsons. I knew him from the time he made his application for employment. He made his first trip October 15, 1908. The deceased, Fred S. Wulf, worked for the defendant at Parsons and Denison 11 months and 23 days. His gross earnings for the entire time were $472.30. From this sum was deducted for the entire time $196.10, leaving a balance which he was actually paid by the defendant of $272.20.

Cross Examination.

Fred S. Wulf was a very tall young man and very well proportioned. He appeared to be a physically sound man. He went to work as fireman out of Parsons October 15, 1908, and worked until the 27th of November, when he was killed. He did not have a regular run, but was on the extra board. It would not be possible for him to get a regular run until he had been in the service six months, and it might be longer than that. It is all owing to circumstances, and I could not say how long it would have been before he got a regular run had he lived. The average earnings of a regular fireman run about $78.00 or $80.00 per month. During October, 1908, deceased earned $44.80 and during November $17.10.

When the testimony of the witness relative to the earnings of a regular fireman was offered to be introduced, the defendant objected because the same would be irrelevant and immaterial and speculative. The court overruled the objections
72 and the evidence of the witness as above set out was permitted to go before the jury for their consideration. To this action of the court the defendant then and there duly excepted and still excepts and in this behalf tenders its bill of exceptions.

W. H. MATTOX testified for defendant:

I am assistant superintendent of motive power for the defendant at Parsons, Kansas. I remember the occasion of engine 488 blowing up near Parsons, Kansas, in November, 1908. An hour and a half or two hours after the explosion I went out and examined the boiler. I could tell what caused the explosion. It was caused by low water. I base that statement on the discoloration of the crown sheet, together with the radial stays and other stays that held it, and another thing was the stretching or elongation of the holes where the stays went through the crown sheet, the condition of the bottom of the bolts and the fact that they were drawn through the sheet, caused by heat and stretching. It measured 1-16 of an inch and the crown sheet was thinner than a normal crown sheet thinner than it was originally; the original crown sheet was 3/8 of an inch thick, and that is standard.

Cross Examination.

The superintendent of motive power is Mr. O'Herrin and I am assistant. I have charge of the shops and the repair of engines. Mr. O'Herrin is head of the department and I work under him, and I am next to him. If the engine blew up on account of being sent out in improper condition, my depart-
73 ment is charged with it. I was not anxious to show that my department was not responsible for the explosion. We got engine 488 from the Baldwin Locomotive Works. The engine had come to the back shops at Parsons and had been worked over. There were not 25 or 30 buckles in the left side sheet. It was buckled some, but not to that extent on the left side sheet. There were possibly a dozen or 14 buckles in the left side sheet, and possibly more. It is not necessary to burn the side sheet to buckle it, and the buckling of the side sheet was not necessarily because it was too thin. The buckling may be caused by the steam pressure which throws the sheet out of alignment. I do not consider a buckled side sheet dangerous, and we do not take them out as a rule. As to whether a buckle or bad is taken out is left to the judgment of the foreman or boiler maker. I am not governed by the judgment of the foreman or boiler maker. We sometimes hold a consultation about a matter of that kind. There were no

buckles in the crown sheet of this engine that I saw. The pressure of the steam is not usually on the crown sheet, but is all over the boiler space. The weight of the water and the pressure of the steam will buckle a side sheet. I could not state the number of side bolts and crown bolts that were out of condition when the engine came to the back shops. I believe there were about eight crown bolts renewed. I presume they were loose. There was a leak in the left side sheet; there was a crack in the left side sheet about 24 inches long. I do not know what was the cause of the crack. I suppose it was caused by contraction and expansion of the sheet. Engine 488 had been in service about six years, and the fire box had been in her 20 months, and the left side sheet was cracked 24 inches. The left side sheet was not crystalized. The sheets do not lose their tensile strength by use. We determine how
74 much steam pressure boiler plate will stand by actual working tests. After we have repaired an engine we consider it will stand the same steam pressure that it would when it was originally designed by the manufacturers. There is always a certain margin of safety allowed in the construction of a boiler, and it will bear a greater pressure than is ever used in actual practical operation on the road. The safety valves are so regulated that it will blow off when the steam reaches a certain point. I did not see the engine after it was brought out for use. I first saw it after it left the shops after it exploded. The boiler was about 130 feet east of the track after the explosion. It went 80 feet beyond the edge of the right-of-way. There was no water about where the boiler was when I got there. I found the crown sheet of the boiler was 1-16 of an inch thinner than it ought to have been, and I believe this to have been due to the heat and stretching in the explosion. I measured and found the distance between the stay bolts to be five inches, and therefore know the plate stretched. The distance ought to have been four inches between the bolts. I did not measure the thickness of the crown sheet before the explosion. The flues were taken out of the boiler and new flues put in before the explosion. I saw the engine and boiler four or five days before it blew up. I did not see the report of Engineer Felton as to the condition of the engine when he tried her out. I did not know until after the explosion that he had been sent out to test the engine. He was sent out by the master mechanic.

Re-Direct Examination.

75 The water glass on an engine is 12 inches long, and about 11-16 outside diameter, with a hole in it possibly ⅜ or 7-16. If the glass was two-thirds full of water that would indicate that the water was over the crown sheet six or seven inches. That much water would not run the engine but a short distance, depending on the weight of the train the engine was pulling, and the amount of work the engine was performing. I do not think that amount of water would carry the engine over half a mile, less than a half mile.

Re-Cross Examination.

I have run engines. The way the train was going out of Parsons was not down grade; it is up hill out of the yards at Parsons. The up grade is about 1500 feet, and when you get over the rise you go down into a sag, and then there is another up grade. After you get over the first up grade it is practically level, or a little depression, and then there is another up grade. The depression is about two blocks long, and then the up grade from there is about a half block, and then there is a down grade, and at the place where the engine exploded it was down grade. I judge the engine had been going down grade about three-quarters of a mile when it blew up. I never did figure exactly how much water would run an engine a certain distance. There is a difference in water for steaming purposes. Some water can not be used for making steam. I state that the distance an engine will run with a given quantity of water depends to some extent on the kind of water you are using and the kind of train you are pulling and the character of the grade. I state as a fact that under certain conditions an engine will not run over a half mile with
76 only six or seven inches of water over the crown sheet. I do not know how many loads or how many empty cars this engine was pulling at the time of the explosion. Engines are provided with an injector that takes the water from the tank to the boiler. If the injector was working when the engine went out of the yards, there was no reason for the engine to run out of water.

Re-Direct Examination.

An engineer does not work his injector all the time. The time he works the injector depends on the amount of work he has to perform. Of course an engine could have an injector that would work all right, and still the water get low and the boiler heat and blow up. The engineer might neglect to work the injector and supply the engine boiler with water.

77 In the Circuit Court of the United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf
vs. C. L. No.
M., K. & T. Ry. Co.

CHARGE.

Gentlemen of the Jury: This is a case by Sallie C. Wulf against the Missouri, Kansas & Texas Railway Company. The plaintiff in the case brings this suit as the mother of Fred S. Wulf. She also alleges that she is the administratrix of the estate of Fred S. Wulf, and, if entitled to recover at all in this case, she will be the sole beneficiary of the judgment.

She alleges that Fred S. Wulf was her son and that on the 27th day of November, 1908, he was in the employment of the defendant, the Missouri, Kansas & Texas Railway Company, as a fireman, and that while in the discharge of his duties as fireman he was on an engine of the defendant company which exploded and resulted in his death. She alleges that at the date of the explosion the engine was old, worn, rusty, out
78 of repair and unfit for use. She alleges that the crown sheet, wagon top, sides, ends and bottom of the engine, and its stay-bolts and radical-stays were old, worn, rusty, crystalized, dangerous and unfit for use. She alleged that by reason of these defects which the court has enumerated the boiler was unable to sustain the pressure of steam to which it was subjected on that occasion, and that by reason of such inability to sustain the pressure of steam, it exploded and killed her son, Fred S. Wulf. She alleges that the defects enumerated above were known to the defendant company, or that they could have been ascertained by the defendant company by the exercise of

ordinary care, and that the defendant failed to remedy such defects and such failure was negligence upon the part of the defendant which makes it liable to her as the plaintiff in this suit.

The defendant denies all the allegations made by the plaintiff in her petition.

The court does not attempt here to state to you the entire allegations of either the petition of the plaintiff or the answer of the defendant, but has only undertaken to give you in substance here what those allegations are in each of the pleadings so the jury may have some understanding of the issues involved and of the instructions upon the law of the case, which the court will proceed to give you. I desire to remark in this connection that the pleadings will be given to the jury on their retirement, and you may, if you see fit, read the pleadings in full and see exactly what the allegations are upon the part of either party to the suit.

The court informs you, gentlemen, as a matter of law,
79 that the denial by the defendant of the allegations contained in the pleadings of the plaintiff puts the plaintiff on proof of the facts necessary to entitle her to recover by a preponderance of the evidence, and if, after a full and fair consideration of the case, you do not believe the plaintiff has established the facts necessary to entitle her to recover, as the court will hereafter explain to you, by a preponderance of the evidence, it will be your duty to find a verdict for the defendant.

By a preponderance of the evidence is not meant the greater number of witnesses who have testified in the case, but by that term is meant the greater weight and degree of credible evidence. That is what is meant by a preponderance of the evidence.

I inform the jury as a matter of law that it will not be sufficient in this case for the plaintiff simply to show that Fred S. Wulf was killed by the explosion of an engine belonging to the defendant company. Before she would be entitled to recover the duty would be upon her to show by a preponderance of the evidence, not only that Fred C. Wulf was killed by the explosion of the engine, but that such explosion was the result of some negligence upon the part of the defendant alleged in the petition. The requirements of the law would not be met by showing a negligent act not alleged in the petition,

but it must be on account of some negligent act alleged. So in this case, if you believe the explosion was caused by the water getting low in the boiler at the time of the explosion, that fact not having been alleged, even though you believe the explosion was so caused, it would be your duty in that state of case to return a verdict for defendant.

80 The court further informs you that the defendant in this case is not an insurer of the safety of its employes. The defendant is not required by law absolutely to furnish to its employes safe and suitable machinery, and in this case the law did not require the defendant to furnish the deceased, Fred S. Wulf, with an absolutely safe and suitable engine upon the occasion on which he met his death. The duty of the defendant in cases like this is met where the defendant has used ordinary care to furnish a reasonably safe and suitable engine upon which the deceased was to work. Perhaps I can make it plainer. I say in a case like this the law does not devolve upon the defendant the duty absolutely to furnish a safe and suitable engine, but the law does devolve upon the defendant the duty to use ordinary care to furnish a safe and suitable engine upon which the deceased can work.

The court has seen fit to use heretofore in this charge the terms "negligence" and "ordinary care," and, therefore, in order that the jury may understand the instructions they have been and will be given further along in this charge, I will endeavor to explain to you in the simplest possible way what the law means by the use of the terms "negligence" and "ordinary care." You will find occasion in your investigations, in applying the law I will give you to the facts, to apply the legal definition and meaning of these terms "negligence" and "ordinary care."

Now, negligence, gentlemen, in law, means a want of ordinary care, and ordinary care is that degree of care which a person of ordinary prudence would have exercised under the circumstances of the situation. I don't know how I can make
81 the definition briefer and plainer than by giving you the instructions and definitions I have given you.

The court has informed you that it is not the duty of the defendant absolutely to furnish a safe and suitable engine for the deceased upon the occasion upon which he met his death. Upon the other hand, the court does tell you that the

law requires the defendant to use ordinary care to furnish a reasonably safe and suitable engine for the deceased upon the occasion in question, and a failure of the defendant to use ordinary care to furnish such reasonably safe and suitable engine would be negligence upon the part of the defendant, which, if it resulted in the death of the deceased, the failure to do so would entitle the plaintiff in this case to recover. If the defendant exercised ordinary care to furnish the deceased with a reasonably safe and suitable engine upon the occasion in question, then it would not be liable. If it failed to exercise ordinary care to furnish a reasonably safe and suitable engine upon which the deceased was to work upon the occasion in question, it would be liable, and this distinction constitutes one of the vital elements in the case which the jury will have to settle as a question of fact, applying to the evidence the definitions and instructions given you in the charge. If the defendant knew the engine which exploded was unsafe and defective, and with that knowledge of its condition furnished the same to the deceased on the occasion on which it exploded and killed him, then the defendant would be liable. Furthermore, if the defendant by the exercise of ordinary care would have discovered that the engine was unsafe and defective upon the occasion in question, and could by the exercise of ordinary
82 care have remedied such defects, and failed to exercise such ordinary care to discover and remedy them, then the defendant, in that state of case, would be liable for any injury which resulted as a natural and proximate consequence of its failure to exercise such ordinary care, and these matters are all facts and circumstances for the consideration of the jury, applying to the evidence before you the instructions I have given you in this charge.

Now, if the jury find from a preponderance of the evidence that the deceased, Fred S. Wulf, on or about the 27th of November, 1908, was in the employ of the defendant, the Missouri, Kansas & Texas Railway Company, as a fireman, and that on that occasion he was killed by the explosion of the engine on which he was riding; and if you find that said engine was old, worn, rusty, out of repair and unfit for use, by a preponderance of the evidence; and if you find from a preponderance of the evidence that the crown-sheet, wagon-top, ends, sides and bottom of said engine and its stay-bolts, radial

stays, etc., were old, worn, rusty, crystalized, defective and dangerous and unfit for use; and if you further find from a preponderance of the evidence that defendant knew of the condition of said engine, or by the exercise of ordinary care would have discovered it, and by the exercise of ordinary care might have remedied such defects; and if you find from a preponderance of the evidence that the defendant failed to exercise such ordinary care, and that by reason of such failure upon the part of defendant company, the engine exploded and killed deceased, Fred S. Wulf, then you are instructed that plaintiff would be entitled to recover, and it would be your duty to so find.

If you find for the plaintiff in this cause, the measure of
83 damages which you will award her would be such an amount of cash money as would fairly and reasonably compensate the plaintiff for the pecuniary loss which she has sustained by the loss of her son, Fred S. Wulf. The plaintiff would not be entitled to recover anything on account of any mental anguish or grief which the death of her son may have caused her, but her recovery would be measured alone by the pecuniary loss which you find from the evidence she has sustained, and in arriving at such pecuniary loss you may take into consideration the age and earning capacity of the deceased, and you may take into consideration the age of the plaintiff and all other evidence before you, and therefrom ascertain how much pecuniary aid the deceased would have contributed to the plaintiff had he lived; and then you will determine from all these sources what amount of cash money, if paid now, would fairly and reasonably compensate the plaintiff for the pecuniary loss sustained by the death of her deceased son.

If you find for the plaintiff, the form of your verdict may be: "We, the jury, find for the plaintiff, and assess her damages at ———— dollars," filling in the blank with the amount you find.

If you find for the defendant, you will simply say, "We, the jury, find for the defendant."

Your verdict should be in writing and signed by some foreman selected by yourselves.

You are the exclusive judges of the facts, the credibility of the witnesses and the weight to be given their testimony.

As to the law, it is your duty to be governed by the instructions given you by the court.

84 At the conclusion of the evidence and before the court had delivered its main charge to the jury defendant requested the court to give the jury the following instructions in their order:

"1. In this case you are instructed to return a verdict for the defendant."

"2. If you believe from the evidence that the defendant exercised ordinary care to furnish deceased with reasonably safe machinery, your verdict will be for the defendant."

"3. If you believe from the evidence that the explosion of the boiler that killed deceased was due to the fact that the water was permitted to get too low, you will return a verdict for the defendant."

"4. Also in arriving at the value of the pecuniary aid which plaintiff would have received from her son had he lived, you are instructed that you are not required to assume that the amount of future contributions would have continued the same in the future as they have been in the past, but are authorized to take into consideration the probability or non-probability that new relations such as marriage and raising a family of his own, would have been formed by Fred Wulf had he lived which would have lessened his contributions to his mother:

Nor will you allow for any contributions that Fred Wulf might have made to his mother to keep or use for him (Fred),
85 but only for such as he would have appropriated to her as her own."

"5. If you find in favor of the plaintiff, the measure of damages which you will allow will be such sum, which, if paid at this time, will fairly and reasonably compensate the plaintiff, Mrs. Sallie C. Wulf, for the pecuniary loss which she has sustained by the death of her son, Fred S. Wulf. This does not mean that plaintiff is entitled to recover the full amount of such earnings as Fred S. Wulf would have made during his life over the portion thereof which he would have expended for his own purposes, but it means that plaintiff is only entitled to recover compensation for the loss of such pe-

cuniary aid as Fred S. Wulf would have contributed to her had he lived, nor does it mean that plaintiff is entitled to receive at this time the full value of the aid which said Fred S. Wulf would have rendered her in future; for instance, if you believe from the evidence that Fred S. Wulf at some time in the future, say ten years, would have rendered aid to plaintiff of the value, say of $100.00, or any other sum that you may find, it would not be proper for you to find in favor of the plaintiff at this time the full value of such aid, but you will find in her favor such sum as will, if paid now, compensate her for the value of the aid which she would have received at such future time."

86 And the court refused to give said charges, or any of them, to which action of the court in the refusal to give each of said requested charges defendant then and there excepted.

Prior to the trial of this cause, and on the 6th day of January, 1911, at said term of said court, plaintiff presented to the court the following motion:

"Now comes the plaintiff in the above styled and numbered cause, and represents to the court that at the time she filed this suit there was no administration upon the estate of the decedent, Fred S. Wulf, and no necessity for any. That since the filing of said suit, to-wit, on the 4th day of January, 1911, the plaintiff had been appointed temporary administratrix of the estate of Fred S. Wulf, deceased, with full power to prosecute this suit as personal representative of the said Fred S. Wulf, deceased, and has asked that said administration be made permanent at the next term of the County Court. That under the laws governing such matters the plaintiff is the sole beneficiary of whatever amount that may be recovered in this suit; that the same constitutes no assets of the estate of the said Fred S. Wulf, deceased, but go directly to plaintiff.

Wherefore plaintiff moves the court to allow her to amend and to prosecute this suit to its final termination as the personal representative of the decedent, for her individual benefit as well as in her individual capacity, that there may be no
87 doubt as to the proper party plaintiff to this suit under the law."

Which motion was, by the court on said date, granted, and the following order entered:

"On this, the 6th day of January, A. D. 1911, came on to be heard plaintiff's motion to allow her to prosecute this suit as the personal representative of Fred S. Wulf, deceased, as well as in her individual capacity, and the same being considered by the court, is granted, and plaintiff is authorized to prosecute said suit both in her individual capacity and as personal representative. She being the sole beneficiary of whatever amount is recovered."

To which action of the court in granting said order defendant then and there excepted duly and tenders this, its bill of exceptions.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant, Missouri, Kansas & Texas Railway Co.

We hereby agree that the foregoing is a true and correct bill of exceptions, concerning all matters that occurred in the trial of this cause, and that the same contains all of the evidence introduced in the trial of said cause, and the full charge of the court given to the jury, and that the same shall be approved by the court without other or further notice.

J. H. WOOD, JAS. P. HAVEN,
Attorneys for Plaintiffs, Sallie C. Wulf and Sallie C. Wulf, Temp. Admr.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant, Missouri, Kansas & Texas Railway Co.

88 Approved, allowed and made a part of the record herein this 1st day of March, A. D. 1911.

GORDON RUSSELL,
Judge.

Filed March 1st, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

89 PETITION FOR WRIT OF ERROR.

In Circuit Court of the United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf,

vs. C. L. No. 111.

Missouri, Kansas & Texas Railway Company.

To the Hon. Gordon Russell, Judge of the Circuit Court of the United States for the Eastern District of Texas:

The Missouri, Kansas & Texas Railway Company, defendant in the above entitled cause, feeling it is aggrieved by the verdict of the jury and the judgment entered on the 10th day of January, A. D. 1911, comes now by Head, Smith, Hare & Head, its attorneys, and petitions said court for an order allowing said defendant to present a writ of error to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit, and your petitioner will ever pray.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant, Missouri, Kansas & Texas Railway Co.

Writ of error allowed by the District Judge and Judge presiding in said cause this 1st day of Mch., A. D. 1911.

GORDON RUSSELL,
Judge.

Filed March 1st, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

90 ORDER ALLOWING WRIT OF ERROR.

In Circuit Court of the United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf,

vs. C. L. No. 111.

Missouri, Kansas & Texas Railway Company.

The defendant, the Missouri, Kansas & Texas Railway Company, having this day filed its petition for a writ of error, from the decision and judgment thereon made and entered herein to the United States Circuit Court of Appeals in and for the Fifth Judicial Circuit, together with an assignment of errors within due time, and also prays that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security all other proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Fifth Judicial Circuit, and said petition having this day been duly allowed.

Now, therefore, it is ordered that upon the said defendant, the Missouri, Kansas & Texas Railway Company, filing with the clerk of this court a good and sufficient bond in the sum of fifteen thousand ($15,000.00) dollars, to the effect that if said defendant, the Missouri, Kansas & Texas Railway Company, the plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the court; that all further proceedings in this court be and they are hereby suspended and stayed until the determ-
91 ination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 1st day of Mch., A. D. 1911.

GORDON RUSSELL,

Judge.

Filed March 1st, 1911.

C. C. BUMPAS, Clerk.

By J. R. BLADES, Deputy.

92 SUPERSEDEAS BOND ON WRIT OF ERROR.

In Circuit Court of the United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf,

vs. C. L. No. 111.

Missouri, Kansas & Texas Railway Company.

Know all men by these presents: That we, the Missouri, Kansas & Texas Railway Company, a corporation duly incorporated, as principal, and American Surety Co. of New York, a corporation duly incorporated, as surety, are held and firmly bound unto Sallie C. Wulf, and Sallie C. Wulf, administratrix, in the sum of fifteen thousand ($15,000.00) dollars, lawful money of the United States of America, to the payment of which well and truly to be made the said principal and the said surety bind themselves and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of February, A. D. 1911.

Whereas, the above named defendant, the Missouri, Kansas & Texas Railway Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Fifth Judicial Circuit to reverse the judgment in the above entitled cause of the Circuit Court of the United States for the Eastern District of Texas.

Now, therefore, the condition of this obligation is such that the above named Missouri, Kansas & Texas Railway Company shall prosecute said writ to effect and answer all costs and damages if it fail to make good its plea then this obligation shall be void, otherwise to remain in full force and virtue.

93 MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

By HEAD, DILLARD, HARE & HEAD,

Attorneys.

[Seal] AMERICAN SURETY COMPANY OF NEW YORK,

By W. E. WILKIN, Resident Vice-President.

W. W. NELMS, Resident Assistant Secretary.

Approved this 1st day of Mch., A. D. 1911.

GORDON RUSSELL,
Judge.

Filed March 1st, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

94 ASSIGNMENT OF ERRORS.

In Circuit Court of the United States for the Eastern District of Texas, at Sherman.

Sallie C. Wulf,
vs. C. L. No. 111.
Missouri, Kansas & Texas Railway Company.

Comes now the defendant, the Missouri, Kansas & Texas Railway Company, and files the following assignments of error upon which it will rely in the prosecution of the writ of error in the above entitled cause, and says that the Circuit Court of the United States for the Eastern District of Texas erred in the following particulars:

I.

Plaintiff having instituted this suit in her individual capacity as the next of kin of deceased the court erred in sustaining her motion to permit her to amend and prosecute said suit as administratrix and the personal representative of the estate of decedent at the term of court at which the trial was had and judgment rendered.

II.

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

1. Defendant demurs generally to plaintiff's first amended original petition, because the facts therein alleged show no cause of action.

III.

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

2. Defendant demurs specially to plaintiff's petition and

95 says that said cause of action appears to be brought under the statutes of Kansas provided for the recovery of damages on account of injuries resulting in death, and alleges her damages at the sum of $40,000.00 while plaintiff is not permitted under the laws of Kansas to recover in excess of $10,000.00 on such cause of action.

IV.

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

3. Defendant demurs to the following paragraph in plaintiff's petition, specially, to-wit:

"He (deceased) was a locomotive fireman with the reasonable prospects for promotion to the position of locomotive engineer."

because the only materiality of such an allegation would be on the question of amount of recovery, and on that question the proposition of promotion depended upon a great many contingencies and was too speculative to be considered in arriving at the damages sustained by plaintiff.

V.

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

4. It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf that defendant was engaged in interstate commerce between the states of Kansas and Oklahoma, and that deceased was in the employ of de-
96 fendant at the time of his injury and death, and was himself engaged in interstate commerce between the said states and that said cause of action is not governed by the laws of Kansas.

VI.

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

5. Defendant specially demurs to plaintiff's petition on the ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employer's Liability Act, because at the time of the injury and death of F. S.

Wulf defendant was engaged in interstate commerce between the states of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such interstate commerce at the time of his injury and death, and that such cause of action is governed by said Act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf, and not to the plaintiff in this cause.

VII.

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

6. Defendant specially excepts to that portion of said amended petition making the said Sallie C. Wulf a party
97 plaintiff in this cause, and shows that under the Act of Congress, known as the Employer's Liability Act, she is not a proper party to said suit.

VIII.

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

7. Defendant specially excepts to that portion of plaintiff's amended petition making Sallie C. Wulf temporary administratrix of the estate of said Fred S. Wulf, deceased, in this cause of action, because she was not made a party thereto as such administratrix at the time of the filing of the original petition in this cause.

IX.

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

8. Defendant specially excepts to that portion of plaintiff's petition wherein it seeks to make the said Sallie C. Wulf administratrix of the estate of said Fred S. Wulf, deceased, a party plaintiff in this cause for it appears that said deceased, Fred S. Wulf, was killed on the 27th day of November, 1908, and the amendment making the said Sallie C. Wulf administratrix, as aforesaid, party plaintiff herein, as appears in plaintiff's amended original petition filed in this cause January 6, 1911, the same being more than two years from the time the cause of action accrued in this case and the cause of action,
98 if any, the said Sallie C. Wulf had on account of the death of the said Fred S. Wulf is barred by the limitation of two years.

X.

The court erred in overruling defendant's motion to require plaintiff to elect whether she would prosecute this suit in her own right or as administratrix.

XI.

The court erred in refusing defendant's requested instruction No. 1, as follows:

1. In this case you are instructed to return a verdict for the defendant.

XII.

The court erred in refusing defendant's requested instruction No. 2, as follows:

2. If you believe from the evidence that the defendant exercised ordinary care to furnish deceased with reasonably safe machinery, your verdict will be for defendant.

XIII.

The court erred in refusing defendant's requested instruction No. 3, as follows:

3. If you believe from the evidence that the explosion of the boiler that killed deceased was due to the fact that the water was permitted to get too low, you will return a verdict for the defendant.

XIV.

The court erred in refusing defendant's requested instruction No. 4, as follows:

4. Also in arriving at the value of the pecuniary aid which plaintiff would have received from her son had he lived,
99 you are instructed that you are not required to assume that the amount of future contributions would have continued the same in the future as they have been in the past, but are authorized to take into consideration the probability or non-probability that new relations such as marriage and raising a family of his own, would have been formed by Fred Wulf had he lived which would have lessened his contributions to his mother;

Nor will you allow for any contributions that Fred Wulf might have made to his mother to keep or use for him (Fred),

but only for such as he would have appropriated to her as her own.

XV.

The court erred in refusing defendant's requested instruction No. 5, as follows:

5. If you find in favor of the plaintiff, the measure of damages which you will allow will be such sum, which, if paid at this time, will fairly and reasonably compensate the plaintiff, Mrs. Sallie C. Wulf, for the pecuniary loss which she has sustained by the death of her son, Fred S. Wulf. This does not mean that plaintiff is entitled to recover the full amount of such earnings as Fred S. Wulf would have made during his life over the portion thereof which he would have expended for his own purpose, but it means that plaintiff is only entitled to recover compensation for the loss of such pecuniary
100 aid as Fred S. Wulf would have contributed to her had he lived, nor does it mean that plaintiff is entitled to receive at this time the full value of the aid which said Fred S. Wulf would have rendered her in future; for instance, if you believe from the evidence that Fred S. Wulf at some time in the future, say ten years, would have rendered aid to plaintiff of the value, say of $100.00, or any other sum that you may find, it would not be proper for you to find in favor of the plaintiff at this time the full value of such aid, but you will find in her favor such sum as will, if paid now, compensate her for the value of the aid which she would have received at such future time.

Wherefore, the said Missouri, Kansas & Texas Railway Company, plaintiff in error, prays that the judgment of the Circuit Court of the United States for the Eastern District of Texas be reversed and that said Circuit Court be directed to grant it a new trial of said cause.

HEAD, SMITH, HARE & HEAD,
Attorneys for Plaintiff in Error, Defendant, in the Lower Court, Missouri, Kansas & Texas Railway Co.

Filed March 1st, 1911.

C. C. BUMPAS, Clerk.
By J. R. BLADES, Deputy.

101 CLERK'S CERTIFICATE.

I, C. C. Bumpas, Clerk of the Circuit Court of the United States for the Eastern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignment of errors and all the proceedings in cause No. 111 at law, wherein, Sallie C. Wulf is plaintiff and Missouri, Kansas & Texas Railway Company is defendant, as fully as the same remains on file and record in my office at Sherman, Texas.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America, for the Eastern District of Texas, at Sherman, this

..... day of ....., A. D. 1911.

(Seal) C. C. BUMPAS,
Clerk of the United States Circuit Court
Eastern District of Texas.

By .....,
Deputy.

102 I, C. C. Bumpas, Clerk of the Circuit Court of the United States for the Eastern District of Texas, hereby certify that I received this writ on the 1st day of March, 1911, and that on this ..... day of ....., 1911, I have transmitted to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, La., through Messrs. Head, Smith, Hare & Head, attorneys of record for plaintiff in error a true copy of the record and proceedings in the within named cause, duly certified under my hand and seal.

Witness my hand and the seal of said court at my office in the City of Sherman, the day and date last above mentioned.

(Seal) C. C. BUMPAS, Clerk.

By ..... Deputy.

We hereby acknowledge the receipt of three printed copies of the above and foregoing transcript.

This ..... day of ....., A. D. 1911.

.....,

.....,

Attorneys for Defendant in Error.

SALLIE C. WULF
vs. No. 111
M. K. & T. RAILWAY CO.

January 9th, 1911.

Defendant's exceptions to plaintiff's pleadings being considered by the court, were by the court overruled, to which action of the court, defendant in open court excepted.

Defendant's motion to require plaintiff to elect in what capacity she sues, overruled by the court, to which action of the court, defendant in open court excepted.

I, C. C. Bumpas, Clerk of the Circuit Court of the United States, for the Eastern District of Texas, at Sherman, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of entries of orders in cause No. 111 on the Circuit Court minutes of said Court entitled: Sallie C. Wulf vs. M. K. & T. Railway Co. as the same now appears of record in my office.

To certify which, witness my hand and the seal of said Court, at Sherman, in said District, this the 26th day of June, A. D. 1911.

SEAL

C. C. BUMPAS,
Clerk U. S. Circuit Court, E. D. T.
By J. R. Blades, Deputy.

Writ of Error.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The Missouri, Kansas & Texas Railway Company, a corporation, plaintiff in error, and Mrs. Sallie C. Wulf and Mrs. Sallie C. Wulf, Administratrix of Estate of Fred S. Wulf, deceased, defendants in error, a manifest error hath happened, to the great damage of the said Missouri, Kansas & Texas Railway Company, plaintiff in error, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, La. in said Circuit, in not exceeding thirty days from the 1st day of March, 1911, being the date of issuance of the citation herein, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 1st day of March, in the year of our Lord one thousand nine hundred and eleven.

C. C. BUMPAS,
Clerk of the Circuit Court of the United States
for the Eastern District of Texas,
By A. O. BRACKETT, *Deputy.*

Allowed by
GORDON RUSSELL,
United States Dist. Judge.

I hereby certify that a true copy of the within writ has this day been lodged in the Clerk's office for the use of the defendant in error.

Dated 1st day of March, 1911.

C. C. BUMPAS,
Clerk of the Circuit Court of the United States
for the Eastern District of Texas.
By A. O. BRACKETT.

The foregoing has the following indorsements to-wit:
No. 2207. Missouri, Kansas & Texas Railway Company, Appellant, vs. Mrs. Sallie C. Wulf, et al., Appellees. Writ of Error. Filed 1st day of March, A. D. 1901. C. C. Bumpas, Clerk. By A. O. Brackett, Deputy. U. S. Circuit Court of Appeals. Filed Apr. 24, 1911. Charles H. Lednum, Clerk.

Citation.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to Mrs. Sallie C. Wulf, of Grayson County, Texas, and Mrs. Sallie C. Wulf, Administratrix of Estate of Fred S. Wulf, Deceased, and J. H. Wood and Jas. P. Haven, their Solicitors of Record, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of Fort Worth, in the State of Texas, in said Circuit, within thirty days from the date of this writ, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the Eastern District of Texas, wherein Missouri, Kansas & Texas Railway Company, a corporation, is plaintiff in error, and you, Sallie C. Wulf and Sallie C. Wulf, Administratrix, are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 1st day of March, A. D. 1911, and of the independence of the United States the one hundred and 734th year.

GORDON RUSSELL,
United States District Judge.

We hereby accept service of a copy of the above and foregoing citation for defendants in error.
This March 4, 1911.

J. H. WOOD,
JAS. P. HAVEN,
Attorneys for Defendants in Error.

The foregoing has the following indorsements to-wit:
No. 2207. Missouri, Kansas & Texas Railway Company, Appellant, vs. Sallie C. Wulf, et al., Appellees. Citation. Filed 1st day of March, A. D. 1911. C. C. Bumpas, Clerk. By A. O. Brackett, Deputy. U. S. Circuit Court of Appeals. Filed Apr. 4, 1911. Charles H. Lednum, Clerk.

Motion to Correct Record.

In United States Circuit Court of Appeals, Fifth Circuit.

No. 111.

SALLIE C. WULF
vs.
M., K. & T. RAILWAY CO.

Now comes the plaintiff in error, the Missouri, Kansas & Texas Railway Company, and represents to the Court that through some oversight the clerk omitted from the record certified in this case two orders disposing of plaintiff in error's demurrers to defendant in error's petition, and also plaintiff in error's motion to require defendant in error to elect, which said orders were entered of record before the trial of said cause and are duly certified to by the clerk of the Circuit Court for the Eastern District of Texas; that it is necessary for said orders to be embodied in the record in this case in order to properly present the questions raised on the trial of said cause; that copies of said orders, and the certificate thereto, have been printed, numbered seventy-five (75) and are in the hands of the clerk of this court.

Wherefore plaintiff in error prays that said orders be made a part of the record in this cause in this court, and that the printed copies thereof be inserted in the printed record by the clerk of this court as page 75.

HEAD, SMITH, HARE & HEAD,
Attorneys for Plaintiff in Error,
Missouri, Kansas & Texas Ry. Co.

CECIL H. SMITH,
Of Counsel.

We, the undersigned attorneys for defendant in error, Sallie C. Wulf, acknowledge receipt of a copy of the foregoing motion. We have examined said motion and the copies of orders attached thereto. We find the same correct and agree that the relief prayed for may be granted.

This 28th day of June, A. D. 1911.

J. H. WOOD,
JAS. P. HAVEN,
Attorneys for Defendant in Error, Sallie C. Wulf.

SALLIE C. WULF
vs.
M., K. & T. RAILWAY CO.

JANUARY 9TH, 1911.

Defendant's exceptions to plaintiff's pleadings being considered by the court, were by the court overruled, to which action of the court, defendant in open court excepted.

Defendant's motion to require plaintiff to elect in what capacity she sues, overruled by the court, to which action of the court, defendant in open court excepted.

Page

In the Circuit Court of the United States for the Eastern District of Texas, at Sherman.

I, C. C. Bumpas, Clerk of the Circuit Court of the United States, for the Eastern District of Texas, at Sherman, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of entries of Orders in cause No. 111 on the Circuit Court Minutes of said Court entitled: Sallie C. Wulf vs. M., K. & T. Railway Co., as the same now appears of record in my office.

To certify which, witness my hand and the seal of said Court, at Sherman, in said District, this the 26th day of June, A. D., 1911.

[SEAL.]

C. C. BUMPAS,
Clerk U. S. Circuit Court, E. D. T.,
By J. R. BLADES, *Deputy.*

The foregoing has the following indorsements to-wit:

No. 2207. No. 111. U. S. Circuit Court, Eastern District of Texas, at Sherman. Sallie C. Wulf vs. M., K. & T. Ry. Co. Motion to correct record, etc. U. S. Circuit Court of Appeals. Filed Aug. 1, 1911. Charles H. Lednum, Clerk.

Argument and Submission.

No. 2207.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
SALLIE C. WULF.

Nov. 13, 1911.

On this day this cause was regularly called, and after argument by Cecil H. Smith, Esq., for plaintiff in error, and Judson H. Wood, Esq., for defendant in error, was submitted to the court.

Opinion of the Court.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2207.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
v.
Mrs. SALLIE C. WULF, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Texas.

Before Pardee and Shelby, Circuit Judges, and Grubb, District Judge.

By the COURT:

Under the Kansas law as well as under the Federal Employers' Liability Act, Mrs. Sallie C. Wulf was the sole beneficiary and entitled to all damages resulting from the negligent killing of her son Fred S. Wulf, therefore in the absence of objections made *in limine* it was immaterial whether the suit to recover the said damages was prosecuted by Sallie C. Wulf individually, or by Sallie C. Wulf, administratrix of the estate of Fred S. Wulf, or in both capacities.

The cause of action originally sued on was to recover damages for the negligent killing of Fred S. Wulf, and this cause of action was not subsequently abandoned or changed by any amendment in the pleadings nor by the permission of the trial Court that the said Sallie C. Wulf might prosecute the suit individually and as administratrix of Fred S. Wulf; and as the suit was brought within two years from the death of said Fred S. Wulf the statutory bar under the Kansas law or under the Federal Employers' Liability Act was not well pleaded.

On the whole case we find no prejudicial error warranting a reversal. The judgment of the Circuit Court is

Affirmed.

(Original filed Dec. 11, 1911.)

Final Judgment.

No. 2207.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
SALLIE C. WULF.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Texas, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, Missouri, Kansas & Texas Railway Company, and the surety on the writ of error bond herein, American Surety Company of New York, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

Dec. 11, 1911.

Petition for Writ of Error.

United States Circuit Court of Appeals for the Fifth Circuit.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
SALLIE C. WULF, Defendant in Error.

Petition for Writ of Error.

Your petitioner, The Missouri, Kansas & Texas Railway Company, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and a judgment has therein been rendered on the 11th day of December, A. D. 1911, affirming a judgment of the Circuit Court of the United States for the Eastern District of Texas, and the matter in controversy in said suit exceeds One Thousand ($1,000.00) Dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is, or was, dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and, therefore, your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE MISSOURI, KANSAS & TEXAS RY. CO.,
Plaintiff in Error,
By HEAD, SMITH, HARE & HEAD,
Its Attorneys.

The foregoing petition is granted and writ of error allowed as prayed for, upon plaintiff in error's giving a supersedeas bond, according to law, in the sum of Sixteen Thousand ($16,000.00) Dollars.

DON A. PARDEE,
Circuit Judge, Fifth Circuit.

Dec. 21st, 1911.

The foregoing has the following indorsements to-wit:
No. 2207. Missouri, Kansas & Texas Ry. Co., Plaintiff in Error, vs. Sallie C. Wulf, Defendant in Error. Petition for writ of error. Filed 21 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Firth Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between the Missouri, Kansas & Texas Railway Company, plaintiff in error, and Sallie C. Wulf, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 21st day of December, in the year of our Lord one thousand nine hundred and eleven.

FRANK H. MORTIMER,
Clerk U. S. Circuit Court of Appeals.

Allowed by
DON A. PARDEE,
Circuit Judge, Fifth Circuit.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error, 21st day of December, 1911.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER, *Clerk.*

[Endorsed:] No. 2207. Missouri, Kansas & Texas Ry. Co., Plaintiff in Error, vs. Sallie C. Wulf, Defendant in Error. Writ of Error. Filed 21 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Bond.

Know all men by these presents: That we, the Missouri, Kansas & Texas Railway Company, a corporation incorporated under the laws of the State of Kansas, having a principal place of business in the City of Parsons, County of La Bete and State of Kansas, as principal, and American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and having an office and regular place of business in the City of Sherman, County of Grayson, and State of Texas, as surety, are held and firmly bound unto Sallie C. Wulf in the full and just sum of Sixteen Thousand ($16,000.00) Dollars to be paid to the said Sallie C. Wulf, her certain attorneys, executors, administrators or assigns, to which payment well and truly to be made the said principal and the said surety bind themselves, their and each of their successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 21st day of December, in the year of our Lord nineteen hundred and eleven.

Whereas, lately in the Circuit Court of Appeals for the Fifth Circuit in a suit depending in said court between the Missouri, Kansas & Texas Railway Company, plaintiff in error, and Sallie C. Wulf, defendant in error, a judgment was rendered against the said Missouri, Kansas & Texas Railway Company, and the said Missouri, Kansas & Texas Railway Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sallie C. Wulf citing and admonishing her to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 20th day of January, next.

Now, the condition of the above obligation is such, that if the said Missouri, Kansas & Texas Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By HEAD, SMITH, HARE & HEAD,
Its Attorneys.
AMERICAN SURETY CO. OF NEW YORK,
By RUFUS G. HALL,
Resident Vice-Pres.

Approved by:
DON A. PARDEE,
Circuit Judge, Fifth Circuit.

The foregoing has the following indorsements to-wit:

No. 2207. Missouri, Kansas & Texas Ry. Co., Plaintiff in Error, vs. Sallie C. Wulf, Defendant in Error. Bond on Writ of Error. Filed 21 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Assignment of Errors.

United States Circuit Court of Appeals for the Fifth Circuit.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

SALLIE C. WULF, Defendant in Error.

Now comes the plaintiff in error, the Missouri, Kansas & Texas Railway Company, by Head, Smith, Hare & Head, its attorneys, and says that in the record and proceedings aforesaid of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the said plaintiff in error in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Texas for Seven Thousand ($7,000.00) Dollars, and interest at the rate of six (6%) per cent per annum from and after the 10th day of January, A. D. 1911, and costs of suit, entered on error in favor of said defendant in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said Circuit Court for a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in said cause, which is as follows:

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

4. It appears from plaintiff's petition that at the time of the injury and death of F. S. Wulf that defendant was engaged in interstate commerce between the states of Kansas and Oklahoma, and that deceased was in the employ of defendant at the time of his injury and death, and was himself engaged in interstate commerce between the said states and that said cause of action is not governed by the laws of Kansas.

Fourth. The said Circuit Court of Appeals erred in not sustaining the sixth assignment of error upon the record in said cause, which is as follows:

The court — in overruling the following exception of defendant to plaintiff's first amended original petition:

5. Defendant specially demurs to plaintiff's petition on the

ground that it appears from said petition that the cause of action, if any there is, arising from the death of F. S. Wulf, grows out of and depends upon an Act of Congress passed in 1908, known as the Federal Employers' Liability Act, because at the time of the injury and death of F. S. Wulf defendant was engaged in interstate commerce between the states of Kansas and Oklahoma, and the said F. S. Wulf was in defendant's employ and was himself engaged in such interstate commerce at the time of his injury and death, and that such cause of action is governed by said Act of Congress passed in 1908, and arises to the personal representative of F. S. Wulf, and not to the plaintiff in this cause.

Fifth. The said Circuit Court of Appeals erred in not sustaining the seventh assignment of error upon the record in said cause, which is as follows:

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

6. Defendant specially excepts to that portion of said amended petition making the said Sallie C. Wulf a party plaintiff in this cause, and shows that under the Act of Congress, known as the Employers' Liability Act, she is not a proper party to said suit.

Sixth. Said Circuit Court of Appeals erred in not sustaining the eighth assignment of error upon the record in said cause, which is as follows:

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

7. Defendant specially excepts to that portion of plaintiff's amended petition making Sallie C. Wulf temporary administratrix of the estate of said Fred S. Wulf, deceased, in this cause of action, because she was not made a party thereto as such administratrix at the time of the filing of the original petition in this cause.

Seventh. Said Circuit Court of Appeals erred in not sustaining the ninth assignment of error upon the record in said cause, which is as follows:

The court erred in overruling the following exception of defendant to plaintiff's first amended original petition:

8. Defendant specially excepts to that portion of plaintiff's petition wherein it seeks to make the said Sallie C. Wulf administratrix of the estate of said Fred S. Wulf, deceased, a party plaintiff in this cause for it appears that said deceased, Fred S. Wulf, was killed on the 27th day of November, 1908, and the amendment making the said Sallie C. Wulf administratrix, as aforesaid, party plaintiff herein, as appears in plaintiff's amended original petition filed in this cause January 6, 1911, the same being more than two years from the time the cause of action accrued in this case and the cause of action, if any, the said Sallie C. Wulf had on account of the death of the said Fred S. Wulf is barred by the limitation of two years.

Eighth. Said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error upon the record in said cause, which is as follows:

The court erred in refusing defendant's requested instruction No. 1, as follows:

1. In this case you are instructed to return a verdict for the defendant.

Ninth. Said Circuit Court of Appeals erred in holding in effect that defendant in error's original petition was a suit brought under the provisions of the Federal Employers' Liability Act of 1908.

Tenth. Said Circuit Court of Appeals erred in holding that the amended petition filed by defendant in error related back to the original institution of this suit.

Eleventh. Said Circuit Court of Appeals erred in rendering judgment against plaintiff in error, and in favor of said defendant in error, for costs of suit in said Court of Appeals.

Wherefore, the said Missouri, Kansas & Texas Railway Company, plaintiff in error, prays that for the errors aforesaid, and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the Eastern District of Texas with instructions to grant a new trial in said case, or for such further proceedings in said cause as may be determined upon by this Honorable Court to the end that justice may be done in the premises.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By HEAD, SMITH, HARE & HEAD,
Its Attorneys.

The foregoing has the following indorsements to-wit:

No. 2207. U. S. Circuit Court of Appeals. Missouri, Kansas & Texas Ry. Co., Plaintiff in Error, vs. Sallie C. Wulf, Defendant in Error. Assignment of Errors. Filed 21 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

THE UNITED STATES OF AMERICA:

The President of the United States to Sallie C. Wulf, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, D. C., within 30 days from date hereof, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of Appeals of the United States for the Fifth Circuit and wherein The Missouri, Kansas & Texas Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Missouri, Kansas & Texas Railway Company, Plaintiff in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 21st day of December, in the year of our Lord one thousand nine hundred and eleven.

DON A. PARDEE,
Circuit Judge.

I hereby this 23rd day of December, 1911, accept due personal service of this citation on behalf of Sallie C. Wulf, defendant in error.

J. H. WOOD,
JOS. P. HAVEN,
Attorneys for Defendant in Error.

[Endorsed:] United States Circuit Court of Appeals, Fifth Circuit. No. 2207. Missouri, Kansas & Texas Ry. Co. vs. Sallie C. Wulf. Citation of Appeal. Marshal's Return. Filed 26 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the 22 pages next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the court (except the transcript of the record from the Circuit Court of the United States for the Eastern District of Texas) in a certain cause in said court, numbered 2207, wherein Missouri, Kansas & Texas Railway Company is plaintiff in error, and Sallie C. Wulf is defendant in error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In Testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 29th day of December, A. D. 1911.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 23,009. U. S. circuit court appeals, 5th circuit. Term No. 933. Missouri, Kansas & Texas Railway Company, plaintiff in error, vs. Mrs. Sallie C. Wulf. Filed January 12th, 1912. File No. 23,009.